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I. INTRODUCTION

International management of highly migratory marine fishery resources is a concept whose time has come and gone.[1] Nevertheless, remnants of this pioneering form of marine fishery management remain today and, when implemented, raise havoc with local and regional fishing economies and federal-state cooperative efforts. When implemented by member nations, international management decisions for highly migratory species have proven to be inequitable and unenforceable and result in *de minimus* conservation benefits. Furthermore, of most concern to the domestic fishing industry,[2] the international management framework lacks certain procedural safeguards, such as judicial review, to check abuses in the decision-making process.

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1. The Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 3, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, saw its unofficial demise when Mexico withdrew as a Contracting Party in 1978. Since the withdrawal of Mexico there have been no international quotas for the harvesting of yellowfin tuna and the resource has not been protected by the imposition of any other international management measures. The remaining Contracting Parties, which included Canada, Costa Rica, France, Japan, Nicaragua, Panama, and the United States, may fish for tuna free of international constraints.

2. Reference to "domestic fishermen" throughout this article applies to fishermen from the eastern and Gulf coasts of the United States.

Nowhere are the deficiencies of an international management framework more evident than in the case of the Atlantic bluefin tuna. The continuing international management of highly migratory species such as Atlantic bluefin tuna stands in direct contrast to the use by the majority of nations of two-hundred-mile fishery management zones for all species including highly migratory species. As of February 1981, approximately 115 nations, including the United States, had declared exclusive management authority over those marine fishery resources found within two hundred miles of their coastlines.[3] In the United States, the Magnuson Fishery Conservation and Management Act of 1976 (the Magnuson Act)[4] established United States jurisdiction and management authority over most fishery resources within two hundred miles of the United States coastline, but the Act exempted highly migratory species of tuna.[5] The passage of the Magnuson Act attests to the recognition by the United States that the performance of international organizations created to manage and conserve marine fishery resources has not been effective and that the principles behind such schemes are not viable.[6]

This article discusses the procedural and substantive aspects of international management of highly migratory marine fishery resources, using as a model the recent efforts towards international management of the Atlantic bluefin tuna. The article contains in Section II an introduction to the Atlantic bluefin tuna resource. Section III describes the framework, functions, and authority of the International Commission for the Conservation of Atlantic Tunas (ICCAT),[7]

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3. OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEA (1981). Whether the term used by a foreign nation is fishery conservation zone or exclusive economic zone, these authorities regulate species of fish found within such 200-mile zones. This figure does not include numerous coastal nations that declare zones encompassing less than 200 miles. A large majority of such coastal nations have declared and exercise authority over highly migratory species, with the exception of the United States. *See infra* text and notes at notes 38-42.

4. 16 U.S.C. §§ 1801-1882 (1976 & Supp. IV 1980). In 1980 the official title of the Act was changed to the Magnuson Fishery Conservation and Management Act. Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 238, 94 Stat. 3300 (amending 16 U.S.C. § 1801).

5. 16 U.S.C. § 1813 (1976).

6. The Magnuson Act contains the following finding: "International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources." 16 U.S.C. § 1801(a)(4) (1976).

7. INT'L CONVENTION FOR THE CONSERVATION OF ATLANTIC TUNAS, 20 U.S.T. 2887, T.I.A.S. No. 6767 (March 21, 1969), [hereinafter cited as the "CONVENTION"]. The Convention was created in Rio de Janeiro on May 14, 1966; ratification was advised by the Senate on March 1, 1967; ratification by the President on April 24, 1967.

the international body which manages this resource. Following is a description of United States federal and state fishery management authority and its relationship with international management of highly migratory species of fish—specifically, Atlantic bluefin tuna. Section IV then discusses the 1981 recommendation of ICCAT. This recommendation restricted the harvest of Atlantic bluefin tuna in the western Atlantic off the east coast of the United States while exempting from its restriction Atlantic tuna in all waters of the eastern Atlantic off the coasts of Europe and Africa. The section documents how the 1981 ICCAT recommendation was reached without advance notice to United States domestic fishermen, and how it was implemented in the United States through federal agency rulemaking over the strong and uniform objections by domestic fishermen and in violation of domestic procedural law. Section VI documents two suits, filed in the Federal District Courts for the Districts of Columbia and Massachusetts, challenging implementation of the ICCAT recommendation. This section describes how, based on international considerations by the agencies and misapplication of the political question doctrine by the courts, plaintiff fishermen in both suits were unable to overcome a strong burden of proof and were not afforded judicial review of the federal implementation of the ICCAT recommendation.

The article suggests in Section VII that the ICCAT recommendation was political in nature and ultimately was not in the best interests of the domestic fishermen. Section VIII offers a recommendation to amend the Magnuson Act to include highly migratory species such as Atlantic bluefin tuna within exclusive United States control. The article intends to show that international management of Atlantic bluefin tuna is no longer in our national interest.

II. The Atlantic Bluefin Tuna

The Atlantic bluefin tuna *(Thunnus thynnus thynnus)* matures to approximately ten feet and 1200 pounds in size.[8] For purposes of management, the National Marine Fisheries Services (NMFS), an agency of the United States Department of Commerce, National Oceanic and Atmospheric Administration, has categorized Atlantic

8. Nat'l Marine Fisheries Service, Nat'l Oceanic and Atmospheric Administration, U.S. Dept of Commerce, Proposed Modification of Regulations Governing the Fishery for Atlantic Bluefin Tuna 8 (1979) [hereinafter cited as Proposed Modification of Regulations].

bluefin tuna by size into young-of-the-year, school, medium, and giant tuna.[9] The Atlantic bluefin tuna is capable of travelling at great speeds, moving through entire portions of the Atlantic Ocean from Labrador to Uruguay in the western Atlantic, and from the Mediterranean to Sierra Leone, Africa, in the eastern Atlantic.[10] It is an oceanic species which travels in schools freely from ocean to ocean and is capable of living in waters of greatly varying temperatures.[11]

In the United States, fishing for Atlantic bluefin tuna was negligible until the late 1950's, when the purse seining method of fishing was introduced.[12] The purse seine method uses airplanes to locate schools of fish. The fishing vessel then discharges a powered skiff which encircles the school with a net. When the circle is completed, the skiff returns the net to the fishing vessel. The net is then pursed at the bottom by drawing in a line attached to the net by rings, thus enveloping the school and drawing the net and the fish contained therein to the fishing vessel. In addition, the commercial expansion of fishing continued with the increasing ex-vessel price paid directly to fishermen for Atlantic bluefin tuna, primarily by the ever-expanding Japanese markets.[13] In particular, catches by Japanese

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9. Young-of-the-year tuna weighs 3.9 kg. and averages 52 cm. in length; school tuna, age 1 through 4, weigh 4-40 kg. and averages 53-133 cm.; medium tuna, age 5 through 8, weigh 41-140 kg. (females) and 41-157 kg. (males), and averages 134-201 cm. (females) and 134-210 cm. (males). Giant tuna, age 9 and older, weigh more than 140 kg. (females) and more than 157 kg. (males), and averages more than 201 cm. (females) and more than 210 cm. (males). *Id.* at 9-10.

10. *Id.* Scientific opinion however, tends to support the conclusion that Atlantic bluefin tuna is composed of two stocks, one in the western Atlantic and one in the eastern Atlantic, with little intermingling. In 1980 ICCAT noted the existence of two temporarily and spatially separate tuna spawning areas and that "the present evidence . . . is toward the hypothesis of separate eastern and western stocks with a small and variable interchange." INT'L COMM'N FOR THE CONSERVATION OF ATLANTIC TUNAS, REPORT FOR BIENNIAL PERIOD 110 (1980-1981).

11. PROPOSED MODIFICATION OF REGULATIONS, *supra* note 8, at 10.

12. *Id.* at 14.

13. *Id.* The ex-vessel price is that paid directly to the fishermen. In some cases it can be as high as $2.50 per pound, compared to the 2 to 4 cents per pound paid for fish prior to the late 1950's.

The vast majority of Atlantic bluefin tuna landed in the United States and Canada is exported to Japan where the tuna is individually auctioned at the Tzukiji Central Wholesale Market. There, the price is determined by the general appearance, evidence of damage in catching or handling, and proper cooling and storage. The buyer is allowed to remove a small portion of the flesh to check for odor, taste, and texture. Most of this tuna then finds its way into restaurants and Japanese sushi bars. Sushi, raw fish served on a rice cake garnished with seaweed, nuts, and soy, is a special and expensive delicacy in Japan. Its presentation, texture, grain structure of the meat, fat, and oil content are highly valued by those Japanese financially able to experience these gustatory delights. COMMW. OF MASS., DIV. OF MARINE FISHERIES, THE

longline fishing vessels increased significantly during the late 1950's and early 1960's.[14]

At about the same time, the recreational fishery for Atlantic bluefin tuna began to expand as well. The term "fishery" is generally defined to include a specific biological unit of fish, referred to as a stock, categorized both by the type of fishing gear used to harvest that unit and by the purposes of the activity. In the case of the early recreational fishery for Atlantic bluefin tuna, the harvesting activity was conducted by small privately owned sport boats and other recreational boats chartered by the general public either individually or in groups for the sole enjoyment of searching for, catching, and landing a fish as large as the Atlantic bluefin tuna. In many instances in the early days, the fish were caught and photographed, then thrown back into the water dead. As the Japanese market for Atlantic bluefin tuna expanded, so did the price for this fish. Tuna fishing became not only an enjoyable pastime, but also a profitable one; consequently, the number of participants in the recreational fishery increased as well.

III. Management Framework of Atlantic Bluefin Tuna

This section sets forth the diverse management framework of Atlantic bluefin tuna. The discussion begins with the international body managing the resource and the United States framework for implementing an international recommendation. Next, the fishery management authority of the United States federal government is discussed. The federal framework presently exempts the Atlantic bluefin tuna from its controls. The section concludes with a brief discussion of individual state authority to manage marine fisheries,

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Economic Impact of the Atlantic Bluefin Tuna Fishery 26-28 (1978) [hereinafter cited as Economic Impact].

14. The Japanese longline method is a deepwater technique which involves a line that may extend for 70 nautical miles on the ocean surface, buoyed with floats and as many as 2000 hooked and baited branch lines. Japanese longline catches which were maintained and reported by the Japanese were 53,308 fish in 1962; 66,838 fish in 1963; 62,636 fish in 1964; 58,598 fish in 1965, and 21,982 fish in 1966. The Japanese longline vessels operate in waters of the northeast and middle Atlantic and Gulf coasts, normally beginning in the late summer operating through the winter and totaling approximately 20 to 40 large fishing vessels. A "drastic change in fishing effort from one side of the Atlantic Ocean to the other, as had been the case with the Japanese, may very well have serious and long-lasting adverse effects upon the bluefin occurring in the western Atlantic." Proposed Modification of Regulations, *supra* note 8, at 7-9.

including Atlantic bluefin tuna, within the three-mile territorial seas surrounding the United States coastline.

A. The International Management Framework and Its Implementation In the United States

On May 14, 1966, the Food and Agriculture Organization of the United Nations sponsored a conference in Rio de Janeiro which resulted in the establishment of the International Commission for the Conservation of Atlantic Tunas (ICCAT).[15] ICCAT membership consists of the United States, Japan, South Africa, Ghana, Canada, France, Spain, Brazil, Portugal, Morocco, Korea, Senegal, Ivory Coast, Cuba, Angola, and the Soviet Union.[16] The Commission is charged to investigate and study tuna resources and to adopt recommendations in order to maintain the populations of tuna and similar fish in the Atlantic Ocean at levels permitting the maximum sustainable catch for food and other purposes.[17] A recommendation approved and adopted by the Commission, however, is not self-executing; of itself it has no force and effect. Before it can take effect, it must be implemented by individual member nations and enforced against their own nationals. Furthermore, before a recommendation is approved and adopted by the full Commission, it must go through a complicated political process of objections by the member nations.

Basically, a recommendation becomes final for all member nations at the expiration of six months from the date of Commission approval unless within that same period of time a member nation objects to the recommendation.[18] In the case of an objection, the recommendation does not apply to the objecting nation; the nation has no treaty obligations to implement the recommendation and may conduct its fishing activities without regard to any provisions of the recommendation as approved by the remaining member nations.[19]

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15. INT'L COMM'N FOR THE CONSERVATION OF ATLANTIC TUNAS, BASIC TEXTS 5-7 (1977). The Commission structure also includes a Council which acts as the executive body. The first regular meeting of the Commission was held in Rome, December 1969, and the first regular meeting of the Council was held in Madrid, November 1970. Both meetings focused on the operating and organizational structure of the Commission and Council, and the compilation of existing biological data on tuna from the Contracting Parties.

16. *Id.* at 48.

17. CONVENTION, *supra* note 7, at Art. IV, VIII.

18. *Id.* at Art. VIII, ¶ 2. The six-month period is triggered from the date of the official notification from the Commission transmitting the recommendation to the contracting parties.

19. After an objection the recommendation is stayed for a sixty day period. During that time any other contracting party may present an objection. If an objection is presented by only one

The Commission is not authorized to establish an independent research team, but is required to use the technical and scientific services of its member nations.[20] Accordingly, the Commission has created a Scientific Committee on Research and Statistics (SCRS) composed of biologists from the member nations whose responsibilities include recommending courses of action to take in conserving and managing Atlantic bluefin tuna.

From its inception until just recently, ICCAT has approved only two recommendations for Atlantic bluefin tuna. These recommendations, both adopted in 1974, were first, "that the Contracting Parties take the necessary measures to prohibit any taking and landing of bluefin tuna *(Thunnus thynnus thynnus)* weighing less than 6.4 kg;" and, second, "that as a preliminary step, the Contracting Parties that are actively fishing for bluefin tuna . . . or those that incidentally catch it in significant quantities shall take the necessary measures to limit the fishing mortality of bluefin tuna to recent levels."[21] There were no objections to these two recommendations and under ICCAT rules they were to be implemented by the individual member nations. In 1974, however, the United States lacked the necessary enabling legislation and therefore was unable to transform the recommendation into law to regulate the fishing activities of United States citizens who fished for Atlantic bluefin tuna.

Thus, the problem presented to the United States in the mid-1970's was a legal inability to live up to its international treaty commitments as a member nation of ICCAT because it was unable to enforce the recommendation against domestic fishermen. The United States did, however, make various attempts to implement the recommendations indirectly through other legislation. The federal government first sought to implement the recommendation through the

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or less than one-fourth of the contracting parties the party or parties concerned are given an additional sixty days to reaffirm their objection. The recommendation becomes effective after this additional period except as to the party or parties objecting and affirming the objection. If a recommendation is objected to by a majority of the contracting parties it becomes void. *Id.* at Art. VIII(3).

20. *Id.* at Art. V. The Scientific Committee on Research and Statistics (SCRS) is composed of scientists and biologists from the member nations and is responsible for compiling and analyzing the biological data collected by each nation. Because the scientists are not an independent unit of ICCAT, each individual tends to bring a national bias from his or her country to bear in the scientific work of ICCAT. The Commission is authorized to establish panels on the basis of species, groups of species, or geographic area. *Id.* There is a panel established for northern bluefin tuna.

21. Proceedings of the Third Regular Meeting of the Int'l Comm'n for the Conservation of Atlantic Tunas, November 20-26, 1974, Madrid, Spain.

United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), under the Fish and Wildlife Act and the Marine Migratory Sport Fish Act.[22] These Acts were not regulatory in nature and offered no general enabling authority by which a federal agency could promulgate a regulation implementing the recommendation; consequently, NOAA abandoned this effort. Thereafter, NOAA attempted to implement the recommendation by declaring Atlantic bluefin tuna to be a threatened species under the Endangered Species Act.[23] NOAA reasoned that if it were to be determined that the resource was threatened, NOAA would then have general rulemaking authority within the Endangered Species Act to protect the species' survival and thereby implement the provisions of the recommendation. Unfortunately, the scientific record could not establish a threatened species categorization for Atlantic bluefin tuna.

NOAA did not approach the coastal states in the Gulf and Atlantic regions to solicit assistance in implementing the ICCAT recommendations or otherwise institute cooperative efforts to restrict domestic fishing activities within state territorial waters through existing state legislative or administrative authorities.[24] Nonetheless, in 1974 the Commonwealth of Massachusetts, due to an extensive and expanding bluefin tuna fishing effort, implemented on its own initiative the first Atlantic bluefin tuna regulations in the United States.[25]

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22. 16 U.S.C. §§ 742a-j (1956); 16 U.S.C. §§ 760c-g (1950). The proposed regulations appeared at 39 Fed. Reg. 14,390 (June 24, 1974). NOAA is the parent agency which has the rulemaking authority for the National Marine Fisheries Service (NMFS) the federal agency charged with the general responsibilities to conserve and manage the marine fishery resources of the United States.

23. 16 U.S.C. §§ 1531-1543 (1973). The proposed rule appeared at 40 Fed. Reg. 14,777 (1975).

24. The Massachusetts Executive Office of Environmental Affairs noted: "The disquieting aspect of this is that they [NOAA] never solicited cooperation from the states to have them tackle the issue." Letter from Mathew B. Connoly to Bill Hicks (Apr. 24, 1975).

25. Taking, Landing & Sale of Bluefin Tuna (August 8, 1974) (unreported Mass. Reg.). This expansion of the fishing effort was generally an increase in participants in the fishery in the form of more fishing vessels and more fishing gear in Massachusetts waters, particularly Cape Cod Bay. The regulations established a fishing season, a catch quota of two fish per day per vessel in the hand gear fishery (rod and reel, hand held line, and harpoon), and a limitation on the number of vessels in the purse seine fishery to those vessels operating on a historical basis prior to 1974. Massachusetts continues to regulate the purse seine fishery in Massachusetts territorial waters in conjunction with the operation of federal regulations. *See* 322 C.M.R. 6.04, 329 Mass. Reg. 45 (1982). The giant Atlantic bluefin tuna fishery (fish over 300 pounds) exists primarily in Massachusetts territorial waters. For example, in 1978, 96% of the total United States quota for that year for giant tuna in the purse seine category was caught in

Further federal efforts to implement the ICCAT recommendation through the Endangered Species Act were abandoned when Congress finally responded to this need by passing the Atlantic Tunas Convention Act of 1975 (ATCA).[26] Pursuant to the enabling authority of ATCA, NOAA in 1975 promulgated the first of many regulations implementing the ICCAT recommendations.[27] These regulations, established for all United States fishermen, created a fishing season, quotas, and licensing and reporting requirements for harvesting Atlantic bluefin tuna. As a result, domestic fishermen were subject to stringent quotas enforced by the United States Coast Guard and Federal Agents of the National Marine Fisheries Service (NMFS), an agency within NOAA,[28] and were subject to sanction through civil and criminal judicial and administrative penalties. The quotas were designed to control the major resource management problem of overfishing. Control of this problem, however, was not achieved through these restrictions. Overfishing continued because of the extensive foreign fishing fleet, particularly the Japanese longline fishing vessels conducting their activities in the Gulf of Mexico and Atlantic Ocean within two hundred miles of the United States coastline.[29]

The foreign fishing fleet was not subject to the United States quotas because, as is generally the case with international agree-

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Cape Cod Bay. Letter from Bruce Freeman to Allen E. Peterson, Jr. (May 3, 1979). As of 1981, approximately one-half of all United States licensed handgear fishermen were Massachusetts residents. NAT'L MARINE FISHERIES SERVICE, STATUS OF NORTHEAST REGIONAL PERMIT SYSTEM 2 (1981). In 1978, it was estimated that 90% of all Atlantic bluefin tuna landed by United States fishermen was landed in Massachusetts, and a "much higher percentage of expenditures in the recreational segment of the fishery is spent in Massachusetts." *See* ECONOMIC IMPACT, *supra* note 13, at i.

26. 16 U.S.C. §§ 971-971h (1976 & Supp. IV 1980). Section 971d authorizes the Secretary of Commerce, upon favorable action by the Secretary of State, to promulgate "such regulations as may be necessary and appropriate" to carry out the 1974 ICCAT recommendation. *Id.*

27. 40 Fed. Reg. 33,978 (1975). The bluefin tuna regulations codified at 50 C.F.R. § 285 would see significant amendments over the next six years, despite the fact that no new ICCAT recommendations were to evolve until 1981. Just prior to the 1981 ICCAT recommendation, the management scheme divided the fishery into handgear (handline, harpoon and rod and reel), with quotas for each component, and purse seine participants, with individual vessel allocations. For a general discussion of this regulatory evolution see NAT'L MARINE FISHERIES SERVICE, DISCUSSION PAPER (1979).

28. *See supra* note 22.

29. Concerns were raised by members of the United States Advisory Committee to the United States Commissioners at its October 27, 1976 meeting regarding unrestricted foreign fishing in the United States 200-mile management zone after a domestic Atlantic bluefin tuna closure. "Inquiries were also made by some members of the Committee regarding actions that would be taken against foreign vessels that fish for bluefin in areas off the U.S. coast when the

ments that are not self-executing, implementation and enforcement of the approved recommendations remained the responsibility of each individual member nation. The recommendations as implemented through federal agency rulemaking by the United States applied only to United States fishermen. Japanese fishermen fishing for Atlantic bluefin tuna in waters within two hundred miles of the United States coastline were not subject to the recommendation as implemented by the United States; rather, they were subject to the recommendation as implemented by Japan. As such, violations by the Japanese fishing fleet could only be prosecuted by the Japanese government. Of course, the same held true for all other member nations whose nationals fished for Atlantic bluefin tuna in waters off the coast of the United States. In general, the result of this system is that the strength of any recommendation approved by the Commission lies in the legal force by which it is complied with and enforced by each member.

At the time of the NOAA regulation, the Japanese government continued to rely upon voluntary guidelines and programs designed to implement the ICCAT recommendations and reduce the Japanese catch of Atlantic bluefin tuna.[30] Japan had never restricted its fishing fleets to a quota system similar to that established by the described NOAA regulation. While accurate statistics of Japanese directed and incidental catch rates for Atlantic bluefin tuna are difficult to discern, the United States in 1977 concluded that the unregulated Japanese longline fishing effort of the bluefin tuna was of an unacceptably high volume, stating: "[i]ntense fishing currently directed by Japanese longliners on the bluefin tuna resource in the Gulf of Mexico indicates the development of a situation having serious implications both for the viability of the resource and for the implementation of the [Magnuson] Act."[31] The "serious implication" with respect to the implementation of the Magnuson Act was that the Japanese, while in the process of catching Atlantic bluefin tuna, were also catching in the same net species of fish specifically covered

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season is closed to U.S. fishermen." U.S. Section Meeting with its Advisory Committee and Technical Experts, Record of Discussion 3 (Oct. 27, 1976).

30. Statement of Public Relations Counsel to the Japan Fisheries Ass'n before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, June 26, 1979. "In a letter to the U.S. government on February 16, 1978, the Government of Japan stated that it will cut back on the number of tuna vessels in the Gulf of Mexico so that fishing effort is expected to be substantially lower than the 1976 level." Press Release of the Japan Fisheries Ass'n.

31. Memorandum from Robert W. Schoning, Director, Nat'l Marine Fisheries Service, to David H. Wallace, Ass't Adm. for Marine Resources (May 10, 1977).

by the prohibitions of the Magnuson Act such as marlins. Thus, the foreign fishing effort during the late 1970's not only was undermining the federal implementation of the ICCAT recommendation to prevent tuna stock overfishing, but also was undermining the federal attempt to manage other species of fish through the Magnuson Act. The following section discusses more fully the Magnuson Act and the extent of United States fishery management authority.

B. United States Fishery Management Authority

The 1976 Magnuson Act declared United States management authority over certain marine fishery resources to a lateral two-hundred-mile fishery conservation zone.[32] The Magnuson Act created eight regional fishery management councils composed of fishery experts from the federal government, state government, and the fishing industry, and charged these councils to develop fishery management plans for species of fish found within their respective geographic areas.[33] The plans are to be submitted to the United States Department of Commerce for approval and implementation by federal agency rulemaking.[34] The Magnuson Act authorizes foreign fishing, provided there is a governing international fishery agreement between the United States and the foreign government, that each foreign fishing vessel obtain a permit, and that the foreign government be suject to an allocation for each particular species of fish.[35]

The Magnuson Act, however, specifically exempts from its application highly migratory species of tuna, defined as those "species of tuna which in the course of their life cycle, spawn and migrate over great distances in waters of the ocean."[36] Such tuna were the only species exempted from the Magnuson Act's establishment of United States fishery management authority within the two-hundred-mile zone. The proscriptions of the Magnuson Act are, therefore, not applicable to the Atlantic bluefin tuna, which has been classified by NOAA as a highly migratory species.[37] This exemption was incor-

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32. 16 U.S.C. §§ 1801-1882 (1976 & Supp. IV. 1980). For a discussion of the Magnuson Act and its implementation see *Symposium on the Fishery Conservation and Management Act of 1976*, 53 WASH. L.R. 427-745 (1977).

33. 16 U.S.C. § 1852 (1976 & Supp. IV 1980).

34. 16 U.S.C. §§ 1854-1855 (1976 & Supp. IV 1980).

35. 16 U.S.C. §§ 1821-1824 (1976 & Supp. IV 1980).

36. 16 U.S.C. § 1813 (1976).

37. 50 C.F.R. § 601.2 (1978) promulgated under authority of 16 U.S.C. §§ 1852, 1854, 1855. Also exempted were albacore, bigeye, southern bluefin, yellowfin, and skipjack tuna.

porated by Congress to respect the juridical position of the State Department that such species of tuna, because of their highly migratory nature, may not be the subject of national controls. This juridical position allowed the United States to continue participation in international fishery agreements such as ICCAT.[38]

To completely understand the rationale behind this endorsement by Congress of the State Department's juridical position, it should be noted that the exemption entailed a direct recognition of the needs of the established United States Pacific west coast distant water tuna fleets.[39] The Pacific west coast tuna industry, based largely in California, consists of large purse seine fishing vessels, referred to as superseiners, which harvest primarily albacore, skipjack, and

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> Subsection (d) specifically excludes highly migratory species of fish from the exclusive management jurisdiction of the United States. This is in recognition of the wide-ranging migratory behavior of tuna and the need for unification of control pursuant to an international agreement. Adoption of controls by a single nation would be largely ineffective in managing tuna, even if that nation had a 200-mile fishery jurisdictional limit. International management is far more preferable. There are two principal treaties which presently apply to fishing for highly migratory species of fish, including those within an extended 200-mile fishery management zone: (1) The Convention for the Establishment of an Inter-American Tropical Tuna Commission (the "IATTC" Convention), effective March 3, 1950 (1 U.S.T. 230; T.I.A.S. No. 2044); and (2) the International Convention for the Conservation of Atlantic Tunas (the "ICCAT" Convention), effective March 21, 1969 (T.I.A.S. 6767). The IATTC Convention applies to fishing in the eastern tropical Pacific Ocean for yellowfin and skipjack tuna and tuna baitfishes. Member nations are Costa Rica, United States, Mexico, Panama, Canada, Japan and France. The ICCAT Convention covers all waters of the Atlantic Ocean, including the adjacent seas, and regulates fishing for tuna. Japan, Canada, United States, Brazil, France, Portugal, and the Ivory Coast are signatory to this Convention. Exclusion of highly migratory species from the jurisdiction of the United States preserves these treaties. This is also reflective of the U.S. position on ocean fisheries jurisdiction being advanced in the U.N. Law of the Sea Conference.

REPORT OF THE SENATE COMM. ON COMMERCE, S. REP. NO. 961, 94th Cong., 2d Sess. 876 (1976), *reprinted in* A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1967, at 679 (Oct. 1976) [hereinafter cited as LEGISLATIVE HISTORY]. "Since there is no justification for coastal nation jurisdiction over such species, this section [Section 103] declares them subject to international fishery agreements established for that purpose." H. REP. NO. 948, 94th Cong., 2d Sess. 43 (1976).

39. *See* LEGISLATIVE HISTORY, *supra* note 38, at 374-76 (statement of Sen. Tunney). Senator Weicker, chairing a hearing before the National Ocean Policy Study, referred to this section by stating: "This exclusion allows our distant water tuna fleet to disregard judicial claims by other nations on tuna within their own waters. Present U.S. policy therefore allows our tuna boats to enter foreign waters against the will of the claimant nation. A Federal fund, jointly shared with industry is then used to pay the fines of the vessels if seized by a foreign government." *Hearings on S. 1564, Before the Nat'l Ocean Policy Study of the Senate Comm. on Commerce, Science and Transportation,* 97th Cong., 1st Sess. 1 (1981) (statement of Sen. Weicker).

yellowfin tuna, using helicopters to spot the schools of fish.[40] The United States Pacific west coast tuna fishermen travel throughout the Pacific and Indian Oceans, often within two-hundred-mile fishery management zones of foreign countries. They do not pursue tuna in waters of the western Atlantic off the eastern coast of the United States. As noted earlier, however, most foreign coastal nations presently have established their own two-hundred-mile fishery management zones, and most do not recognize tuna as a highly migratory species. Unlike the United States, they exercise authority, including licensing and harvesting restrictions, over all fish found within their management waters, including tuna.[41] This situation obviously left little ocean in which west coast seiners could pursue tuna unencumbered due to the foreign controls placed on the tuna resource by other nations.

In order to protect the interests of the Pacific west coast tuna industry and to reinforce the State Department's juridical position that tuna, due to its highly migratory nature, cannot properly be the subject of exclusively national controls, Congress amended the Fishermen's Protective Act of 1954. Under this amendment, if a United States fishing vessel is seized by a foreign government, the United States pays any foreign fines and penalties and reimburses the owner or owners of the fishing vessel the amount of any fine, license, fee, or other direct charge.[42] This development clearly was

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40. Unlike the Atlantic bluefin tuna, which is exported directly to Japan as an expensive delicacy, albacore, skipjack, and yellowfin are canned and find their way into American lunches.

41. "Eighty-seven nations now claim jurisdiction over tuna, which puts the United States clearly in the minority along with Japan and Spain." *Hearings on S. 1564, supra* note 39, at 2 (statement of Sen. Weicker).

42. 22 U.S.C. § 1972 (1954), *amended by* 16 U.S.C. § 403 (1978). There are considerable political (fishery relationships) problems with foreign governments, particularly United States trust territories. For example, in 1982, Papua New Guinea seized a California-based tuna seiner for fishing without a license and confiscated the vessel and catch, collectively estimated at thirteen million dollars. In addressing the House of Representatives on this issue, Congressman McCluskey stated:

> This occurrence points up the outdated nature of our Fisherman's Protection Act [FPA] [Pub. L. No. 90-482] enacted in 1967 at a time when the United States actively opposed any country's right to claim more than a 3-mile coastal sea. The FPA also has an incredibly deleterious and dangerous impact on our relationship with friendly nations who understandably resent what appears to them to be an arrogant and imperialistic policy, to wit: what is within our 200-mile zone is ours but what is within your 200-mile zone is ours, too, if it is tuna . . . . Under the Act the United States must now prohibit the importation of all tuna into our country from Papua New Guinea . . . . By imposing these sanctions it is expected that operations of two tuna companies based in Papua New Guinea will fail.

desirable from the standpoint of the Pacific west coast tuna industry and was therefore zealously guarded.[43] West coast seiners were able to fish for any and all tunas wherever they were found—regardless of foreign license fees—backed by federal insurance should they be seized and fined by a foreign government for unlawful fishing in foreign two-hundred-mile management waters.

In order to understand the full scope of Atlantic bluefin tuna management it is not enough to examine the international and national management framework. Individual coastal states continue to possess traditional fishery management authority within their respective three-mile territorial seas. A brief description of coastal state fishery management authority and its implications for the Atlantic bluefin tuna resource follows.

C. State Authority

The Magnuson Act exempted state waters from federal authority.[44] Congress, however, included provisions in the Magnuson Act by which the federal government could preempt state authority if a state takes any action or fails to take any action which results in the frustration of federal implementation of a fishery management plan.[45] Section 971 of ATCA[46] authorizes states to promulgate their own timely regulations implementing an ICCAT recommendation. If a state promulgates regulations within a reasonable period of time after an international recommendation, the federal government cannot issue preemptive regulations unless the Secretary of Commerce determines that the state regulations are not adequate to manage

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CONG. REC. H839128 (daily ed. Mar. 11, 1982) (remarks of Rep. McCluskey).

43. Legislative attempts to amend the Magnuson Act so as to include United States management authority over Atlantic bluefin tuna have failed. For example, in 1979 Congressman Gerry Studds from Massachusetts introduced H.R. 4357 specifically exempting Atlantic bluefin tuna from the definition of highly migratory species in the Magnuson Act. The bill failed in Congress, due in no small part to intense lobbying by the west coast tuna industry.

44. 16 U.S.C. § 1856 (a) (1978 & Supp. IV 1980) provides in pertinent part "nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."

45. 16 U.S.C. § 1856 (b) authorizes the Secretary of Commerce to regulate a fishery within state waters if that fishery takes place predominantly within the fishery conservation zone and the state "has taken any action, or omitted to take any action, the results of which substantially and adversely affect the carrying out of a fishery management plan." For a general discussion of state-federal management, see Greenberg & Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641 (1982).

46. 16 U.S.C. §§ 971d-g (1976 & Supp. IV 1980).

the resource consistent with the recommendation. Thus, while ATCA provides for federal regulation of the Atlantic bluefin tuna, it recognizes, as the Magnuson Act does, state fishery management authority in territorial waters. Section 306 of the Magnuson Act[47] in conjunction with section 971 of ATCA[48] leaves no question regarding the authority of state governments to continue to regulate fishing within their waters, including fishing for Atlantic bluefin tuna.[49]

An example of the exercise of coastal state authority is the Massachusetts regulation governing the Atlantic bluefin tuna fishery in Massachusetts territorial waters. This regulation was enacted in 1974, well before the federal government stepped into the area. Massachusetts continues to manage this resource in its territorial waters in conjunction with federal regulations implementing the 1974 recommendation of ICCAT.[50] Massachusetts also has assisted the federal government with its scientific fishing assessments of the stock by promulgating an emergency regulation prohibiting the obstruction of and interference with such assessments by fishermen in Massachusetts waters who attempt to catch the very fish being caught, tagged, and released by federal officials.[51]

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47. 16 U.S.C. § 1856 (1976 & Supp. IV 1980).

48. 16 U.S.C. § 971g (1976).

49. 16 U.S.C. § 971g authorizes the Secretary of Commerce to preempt a state only if the state "has not, within a reasonable period of time after promulgation of regulations pursuant to this chapter, enacted laws or promulgated regulations which implement any such recommendation of the Commission." The Massachusetts Division of Marine Fisheries, an agency of the Massachusetts Department of Fisheries, Wildlife and Recreational Vehicles, has rulemaking authority over marine fishery resources. MASS. GEN. LAWS ANN. ch. 130, §§ 17(10), 17A (West 1980).

50. 322 C.M.R. 6.04, 329 Mass. Reg. 45 (1982). On December 28, 1978 a bluefin tuna purse seine fisherman filed an action for injunctive and declaratory relief in the United States District Court for the District of Massachusetts challenging the validity of that part of the regulation that placed a limitation on the number of purse seine vessels in Massachusetts waters. The plaintiff's vessel, F/V White Dove, was not an historical participant in the purse seine fishery in Massachusetts waters prior to 1974 and therefore could not obtain a permit from the Massachusetts Division of Marine Fisheries. *See also* Taking, Landing & Sale of Bluefin Tuna (Aug. 8, 1974) (unreported Mass. Reg.); *supra* note 25. In the case, White Dove, Inc., v. Dir. of the Div. of Marine Fisheries & Another, Civ. Action No. 78-3300-G, the Massachusetts Supreme Judicial Court, on a certified question from the Federal District Court, upheld the validity of the challenged regulation. 1980 Mass. Adv. Sh. 1043, 404 N.E. 2d 1169.

51. 178 Mass. Reg. 65 (1979). The value of the Atlantic bluefin tuna fishery to the Massachusetts economy measured in gross revenue generated annually has been estimated at approximately three to six million in 1978 dollars. A moratorium of the nature of the 1981 ICCAT recommendation would have clear economic ramifications to Massachusetts as well as other Atlantic coastal states. ECONOMIC IMPACT, *supra* note 13, at V. This annual figure will fluctuate depending on the manner in which NMFS allocates the United States quota to the

Thus, the federal government, which implements ICCAT recommendations; the coastal states within territorial waters; and foreign nations fishing for Atlantic bluefin tuna in United States waters are all responsible in varying degrees for the management of Atlantic bluefin tuna found off the United States coastline. The article now turns to a discussion of how the recent international recommendation for management of the Atlantic bluefin tuna was derived by ICCAT and implemented by the United States. This discussion shows how the potential for arbitrary abuse of the international management process was realized in at least one instance, and, in doing so, illustrates the economically and socially disruptive effects that international management decisions may have on the domestic fishing industry.

IV. The 1981 ICCAT Recommendation: Proposal for a Fishing Moratorium in the Western Atlantic

Prior to 1981, only two ICCAT recommendations for Atlantic bluefin tuna species had been approved and implemented by the member nations. In the United States, regulations adopted in 1975 implemented the 6.4 kilogram minimum size limit and set an annual domestic quota of roughly 2000 metric tons (mt), determined to be the historical level of fishing off the eastern and Gulf coasts of the United States. Domestic fishermen subsequently achieved a consistent and stable basis of operation under these regulations. During the following years, domestic fishermen and certain politicians continued to voice concerns over the Japanese longline fishing effort, particularly as conducted in the Gulf of Mexico. In the early 1980's neither the fishing industry nor the coastal states in whose waters the fishery occurred were aware of any contemplated changes in the ICCAT recommendations or in the NOAA regulations implementing those recommendations. Domestic fishermen conducted their fishing business with a reasonable expectation that even if regulatory changes were contemplated the fishermen would be notified early enough to allow them to adjust operations. The fishing economies of the various coastal states had adjusted similarly to the quotas established since 1975.

Within this setting the United States Advisory Committee[52] to the United States ICCAT Commissioners held its yearly meeting in

different components of the fishery. Generally, a large handgear quota will result in greater revenues generated in the form of gas, charter and party boat fees, and tourist revenues in the form of hotel, motel, and restaurant fees.

52. 16 U.S.C. § 971b authorizes the United States Commissioners, of which there are not

Washington, D.C., on October 15 and 16, 1981. The agenda distributed by NMFS to Advisory Committee members contained no indication that there would be any action on or major changes to the existing 1974 ICCAT recommendations or to the present NOAA regulations.[53] At the meeting, NMFS scientists noted that the mortality rate of the stock of bluefin tuna in the western Atlantic had stabilized, but that the overall abundance of the western stock apparently had continued to decline. In contrast, the scientists concluded that the abundance of the eastern stock had stabilized.[54] Despite this two-stock analysis, the NMFS scientists refused to pronounce categorically Atlantic bluefin tuna as two separate stocks of fish—western Atlantic and eastern Atlantic. The scientists concluded that assessing the bluefin tuna as a single Atlantic-wide stock yielded results which were unbiased, while separate assessments of the eastern and western Atlantic stocks might yield erroneous conclusions.[55] Put another way, the scientists simply acknowledged that the present single-stock assessments were more accurate and reliable than the two-stock assessments.

On October 16, 1981, the Advisory Committee recommended: (1) that the United States delegation continue with the present ICCAT measure to limit mortality of bluefin tuna; (2) that a United States statement on coastal states preference be presented to ICCAT; and (3) that the groundwork be established for the possible imposition of a moratorium on directed fisheries in known spawning areas.[56] On November 3, NMFS issued the United States position to be proposed at the upcoming ICCAT meeting. This position incorporated the recommendation of the Advisory Committee.[57] The record is silent on

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more than three appointed by the President, in turn to appoint an Advisory Committee of not more than twenty individuals "from the various groups concerned with the fisheries covered by the Convention." Members of the Advisory Committee attend all meetings of the Commissioners, are authorized to review all proposed programs, reports, recommendations and regulations of the Commission, and generally to advise the United States Commissioners at the ICCAT meetings. One of the three United States Commissioners is also the NMFS Director of the Office of International Fisheries.

53. Letter from Commissioner Carmen J. Blondin to members of the U.S. Advisory Committee (Aug. 21, 1981).

54. U.S. Section Meeting with its Advisory Committee and Technical Experts, Record of Discussion 3 (Oct. 15, 1981).

55. *Id.*

56. *Id.* at 2. A "moratorium" is generally a complete fishing ban; in this instance it would become a ban in the Gulf of Mexico for vessels that direct their fishing effort on Atlantic bluefin tuna that are known to be spawning, the act of producing eggs.

57. Letter from Comm'r Carmen J. Blondin to members of the U.S. Advisory Comm. (Nov.

the events that transpired between November 3, 1981, the date the United States position was made public, and November 11, 1981, the first day of the ICCAT meeting.[58] Nevertheless, the actual proposal submitted to ICCAT by the United States (NMFS) Commissioner was radically different than the proposal reviewed and approved by the Advisory Committee.[59] The final recommendation approved by ICCAT was for a moratorium for two years in the western Atlantic bluefin tuna fishery, with a small quota for purposes of continued scientific assessment of the stock. When brought back to the United

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3, 1981). This was the position that the United States led the domestic fishermen and marine fishery officials from the coastal states to believe would be made at the ICCAT meeting in Tenerife, Canary Islands. The concept of "coastal state preference" has its roots in international law. As envisioned for Atlantic bluefin tuna, it would entail a single international quota with priority allocation for coastal states based on the concentration of the resource and coastal state historic fishing rights. Under this approach, most if not all of the quota would be allocated to United States fishermen. Mr. George Mannina of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment responded to inquiries from Advisory Committee members that such a position would be contrary to the United States juridical position on highly migratory species and pointed out that the United States share would not be a unilateral decision. It would appear as if United States foreign policy would work both ends by allocating the available quota of Atlantic bluefin tuna in United States waters to domestic fishermen. This would effectively remove foreign Atlantic bluefin tuna fishing in United States waters without altering the State Department's juridical position on highly migratory species. *See* U.S. Section Meeting with its Advisory Committee and Technical Experts, Record of Discussion (Oct. 16, 1982).

58. One observation revealed by the list of attendees discloses that there were six individuals with ties to the west coast tuna industry. The distant water west coast tuna seiners, however, do not fish for Atlantic bluefin tuna in waters of the western Atlantic off the coast of the United States. *See* NAT'L MARINE FISHERIES SERVICE, REP'T OF U.S. DELEGATION TO SEVENTH REGULAR MTG. OF THE INT'L COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNAS (Nov. 1981). One could speculate that the representatives from the Pacific west coast tuna industry were present in order to serve their own ends in protecting the continuation of the State Department's juridical position on highly migratory species, which was being questioned by Congress at that time. *See infra* text and note at note 142. To divert public attention from proposed amendments to include highly migratory species within the Magnuson Act, these individuals may have favored the imposition of a moratorium on Atlantic bluefin tuna having economic ramifications on the east coast tuna fishermen, which would deflect attention from supporting the amendments to challenging the moratorium. As described *infra* at 152, this is precisely what occurred.

59. During Congressional briefings on the ICCAT recommendation, Congressman John Breaux noted:

> Mr. Forsythe initiated efforts, fully supported by me and many other members of the Committee to encourage the . . . assertion by the United States of a coastal state preference at the recently concluded meeting of the International Commission for the Conservation of Atlantic Tuna. As everyone is probably aware . . . the ICCAT Convention proposed and adopted a radically different measure.

Hearings on S. 1564, supra note 39, at 2 (Opening Statement of Rep. John Breaux, Subcomm. on Fisheries and Wildlife Conservation and the Env't) (Dec. 7, 1981).

States by its Commissioners, this recommendation came as a total surprise to the industry and state governments.[60]

The ICCAT meeting which resulted in this recommendation was convened in the Canary Islands, Tenerife, Spain, on November 11 through 17, 1981. The record discloses that a NMFS biological report which was prepared for the ICCAT meeting as part of the SCRS committee process[61] reiterated the uncertainties concerning stock structure, but concluded that current evidence supported a theory of two separate eastern and western Atlantic stocks.[62] Based upon this two-stock approach, the report concluded that the western Atlantic stock of bluefin appeared severely depleted and recommended that catches there be reduced to as near zero as possible.[63]

Noting the decreasing volume of bluefin tuna in the western Atlantic, the NMFS Commissioner, without regard to the two-stock structure hypothesized in the NMFS biological report, proposed to limit the harvest of Atlantic bluefin tuna in the western Atlantic to 565 mt annually for a two-year period.[64] Based on Canadian concerns that

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60. The Commonwealth of Massachusetts immediately noted:

> The final result was a recommendation for a two year directed and incidental fishing moratorium for Atlantic bluefin tuna which will have severe and far reaching economic impacts on the Commonwealth without affording the Commonwealth prior opportunity to submit comments, views and scientific, economic or other relevant factors for discussion and consideration. . . . As such the Commonwealth has been effectively foreclosed from exercising its legitimate conservation and management responsibilities, and from protecting the economic interests of its residents.

Position of the Commonwealth of Massachusetts (Jan. 19, 1982).

The United States Advisory Committee had in the past expressed its concerns to the United States Commissioners that it have adequate advanced opportunity to review all United States proposals prior to their presentation to ICCAT. 16 U.S.C. § 971b authorizes the United States Advisory Committee to "examine and to be heard on all proposed . . . recommendations and regulations of the Commission." *See* Charter of the Advisory Committee to the U.S. Nat'l Section of the Int'l Comm'n for the Conservation of Atlantic Tunas, Art. I(C). In 1978 the Advisory Committee emphasized that the:

> Committee wanted to be consulted rather than informed. With regard to position development, the Chairman of the Committee endorsed the procedure whereby the NMFS develops a draft for the Committee to review in ample time to have input into the finalizing of the position prior to the annual ICCAT meeting. The schedule developed by NMFS regarding the development of papers on bluefin tuna which will be submitted to ICCAT calls for distribution of the papers to the Advisory Committee during the first two weeks of September.

U.S. Section Meeting with its Advisory Committee and Technical Experts, Record of Discussion, 3 (Apr. 26, 1978).

61. NAT'L MARINE FISHERIES SERVICE, ATLANTIC BLUEFIN TUNA RESOURCE UPDATE, ICCAT WORKING DOCUMENT, SCRS 81/55 (undated).

62. Delegation Report of the Meeting of Panel 2 (Nov. 1981).

63. *Id.* at 2.

64. Delegation Report, *supra* note 62, at 4.

the 565 mt figure was not sufficient to sustain the Canadian domestic fishery at current levels, a recess resulted in a joint Canadian and United States draft increasing the annual western Atlantic harvest limit to 800 mt.[65] The draft was approved by the Commission and resulted in the ICCAT recommendation for a two-year moratorium, with an annual 800 mt quota for continued scientific assessment of the western Atlantic stock.[66] The 800 mt quota was to be the

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65. *Id.* at 5-6.

66.

> Considering that the SCRS Reports show a decrease in the abundance of the Atlantic bluefin stock; realizing that an alarming decrease is observed in the abundance of this species in the Western Atlantic, whether or not the one or two-stock hypothesis is used; bearing in mind the SCRS recommendation on the need to reduce the western Atlantic bluefin catch to the minimum level acceptable to the aims of scientific supervision; The Commission recommends:
>
> FIRST: That the Contracting Parties take measures to prohibit the capture of bluefin tuna for a period of two years in the Western Atlantic Ocean, as defined on the attached map, except under conditions to be agreed upon by the Contracting Parties whose nationals have been actively fishing for bluefin tuna in the western Atlantic; such conditions to be based on the requirement to index the abundance of the stock.
>
> SECOND: That the Contracting Parties whose nationals have been actively fishing for bluefin tuna in the western Atlantic,
>
> a) consult and conclude such consultations prior to February 15, 1982, in order to develop the conditions under which fishing by their nationals will be carried out. Until such conditions are developed, directed and incidental catches shall be limited to an annual level of 800 MT to enable ongoing scientific studies to be continued.
>
> b) Exchange information amongst themselves on catches on a frequent basis, and report such information annually to ICCAT.
>
> THIRD: That the annual level of catch be adjusted in the western Atlantic on the basis of the scientific evidence produced by the SCRS, to insure the stabilization or increase of the stock.
>
> FOURTH: That the adoption of the above measures concerning the western Atlantic must not imply any modification in the ICCAT recommendation adopted in 1975 concerning a minimum weight of 6.4 kg. adopted for the entire Atlantic and fishing mortality limited to recent levels in the eastern Atlantic; this latter measure being extended until a new decision is made by ICCAT.
>
> FIFTH: That the Contracting Parties take measures to prohibit any transfer of fishing effort from the western Atlantic to the eastern Atlantic in order to thus avoid increasing fishing mortality of bluefin tuna in the eastern Atlantic.
>
> SIXTH: That, with respect to the FIRST and SECOND recommendations, the Contracting Parties whose nationals have been actively fishing for bluefin tuna in the western Atlantic may agree to implement this recommendation at an earlier date, notwithstanding the provisions of Article VIII, paragraph 2 of the Convention.

Seventh Regular Mtg. of the Int'l Comm'n for the Conservation of Atlantic Tunas, Letter of transmittal from O. Rodriguez-Martin, Executive Secretary, to all Contracting Party governments (Jan. 21, 1982).

combined figure for Canada, Japan, and the United States, the three countries determined to be actively fishing for bluefin tuna in the western Atlantic. This figure was approximately one-quarter of the United States domestic quota at that time, not even considering the Canadian or Japanese levels of catch. Split between the three countries this figure was so low as to effectively prohibit the continued domestic commercial fishing for Atlantic bluefin tuna on any meaningful level.

In order to secure the votes of the eastern Atlantic countries, it was agreed to include a recommendation that fishing effort, defined by the number of vessels, extent of gear, and amount of fish caught from the western Atlantic, not be permitted to transfer back to the eastern Atlantic. In other words, despite the new severe restriction on fishing in the western Atlantic, no fishing vessels would be allowed to move their activities from the western Atlantic to the eastern Atlantic.[67]

More specifically, the ICCAT recommendation authorized Canada, Japan, and the United States to establish the final quotas themselves, but provided that, in the interim, the combined level of fishing for all three countries would be set at an annual figure of 800 mt.[68] The full ICCAT Commission had simply acknowledged that, because these three countries conducted the bulk of the fishing for Atlantic bluefin tuna in the western Atlantic, they should determine the management restrictions without the involvement of the full Commission. Pursuant to this apparent delegation of authority to set the final allocation,[69] representatives of these three countries met in Miami, Florida on February 8, 1982, to determine the conditions under which their nationals could fish for Atlantic bluefin tuna. At the conclusion of the Miami consultations, the governments recom-

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67. Apparently, one of the reasons directly underlying the stability of the eastern Atlantic stock was the previous transfer of the Japanese fishing effort in the 1960's from the eastern Atlantic to the western Atlantic.

68. Seventh Regular Mtg. of the Int'l Comm'n for the Conservation of Atlantic Tunas, Second recommendation. On November 23, 1981 NMFS issued a Press Release stating: "Under the conditions to be developed, total catches for the western Atlantic are not likely to exceed 800 metric tons."

69. Letter of transmittal from O. Rodriguez-Martin, *supra* note 66. There are no provisions in the Convention that allow the Commission to delegate its authority to some of the contracting parties to develop recommendations. This point is particularly relevant if the full Commission membership does not approve a recommendation developed by less than all the contracting parties. The full ICCAT membership never approved the results of the Miami, Florida meeting. However, the ICCAT Executive Director did transmit the results of the Miami, Florida meeting to all the contracting parties. *See infra* text and notes at notes 70-71.

mended that Canada receive an annual allocation of 250 mt, Japan receive 305 mt and the United States receive 605 mt.[70] This total quota of 1160 mt was 360 mt greater than the interim quota of 800 mt established by the full ICCAT Commission. In addition, the recommendation specifically exempted Brazil and Cuba; those countries would be permitted to harvest as much Atlantic bluefin tuna as they were capable of harvesting.[71] Therefore, the fishing activities of only Canada, Japan, and the United States were to be proscribed.

What remained at this point was for Canada, Japan, and the United States to implement this recommendation to be effective for

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70. The recommendation adopted by Canada, Japan, and the United States was as follows:

> FIRST: That measures will be taken to limit the annual catch of bluefin tuna in the western Atlantic during 1982 and 1983 to 1160 metric tons (MT) taking into consideration (1) a review of the status of the bluefin tuna stocks, and (2) catch levels necessary to provide data to index the abundance of the stock.
>
> SECOND: That the quota of 1160 MT will be divided among Canada, Japan, and the United States as follows:
>
> | | |
> |---|---|
> | Canada | 250 MT |
> | Japan | 305 MT |
> | United States | 605 MT |
>
> THIRD: That the developing bluefin tuna fisheries in the western Atlantic of Brazil and Cuba, which currently take less than 50 MT annually, shall not be subject to the limitations addressed herein.
>
> FOURTH: That during 1982 and 1983 there will be no directed fishery on the bluefin tuna spawning stocks in the Gulf of Mexico.
>
> FIFTH: That the governments of Canada, Japan, and the United States take steps to implement these provisions as soon as possible and simultaneously in accordance with the regulatory procedures of each country.
>
> SIXTH: That the matters noted in the recommendations contained in paragraphs one to five above be reviewed by ICCAT at its Third Special Meeting in November 1982.

Seventh Regular Mtg. of the Int'l Comm'n for the Conservation of Atlantic Tunas, Transmittal letter from O. Rodriguez-Martin, Executive Director to Contracting Party governments (July 20, 1982).

At the conclusion of the consultation the State of New Jersey commented:

> Just as disturbing is how the United States quota is determined. As best I can determine, it seems to have been set in place by a document prepared by the southeast center which was obviously incomplete in many aspects. This document, as briefly spoken about at the ICCAT Advisors Meeting several weeks ago, was quickly modified by a very short discussion, more or less by a "barter" situation. As a result of that meeting, I am not sure what the quota will be.

Letter from Bruce Freeman to Carmen Blondin (Jan. 29, 1982).

71. Brazil, although not a country actively fishing for Atlantic bluefin tuna, nonetheless attended the meeting in Miami, Florida. Noting that the development of its bluefin tuna fishery had been "rapid and continuing," Brazil requested special consideration so that the development of its bluefin tuna fishery would not be curtailed. Records of the Mtg. on the Western Atlantic Bluefin Management Measures (Feb. 8-12, 1982). It would appear to be inconsistent with the conservation goal of stock rebuilding to establish a moratorium for the directed and

their own nationals who fish for Atlantic bluefin tuna in the western Atlantic. The recommendation in and of itself did not have the force and effect of law. The following section presents the procedures used by the United States to implement this recommendation and the response of the domestic fishing industry and the coastal states both to the recommendation itself and its implementation.

V. The Rulemaking: Implementation of the ICCAT Recommendation Through NOAA Rules

Section 971d of ATCA provides that upon favorable action by the Secretary of State the Secretary of Commerce shall conduct hearings and promulgate "such regulations as may be necessary and appropriate to carry out" ICCAT recommendations.[72] Therefore, the Secretary of State's approval of a recommendation of the full ICCAT Commission is a condition precedent to the initiation of the agency rulemaking process. Through a delegation of authority from the Secretary of Commerce, NOAA possesses this rulemaking authority. It would appear on the face of section 971d that public hearings are required in order to solicit public comments and concerns on the recommendation, and that the regulations promulgated must be both necessary and appropriate.

On April 1, 1982, NMFS[73] requested the Department of State's approval of the ICCAT recommendation developed at the 1981 ICCAT meeting in Tenerife. The NMFS request contained no reference to the subsequent Miami foreign government consultations which in fact constituted the final ICCAT recommendation.[74] On April 14, 1982, the Department of State concurred with the NMFS recommendation of support for the November 1981 ICCAT recommendation.[75] Again, there was no reference to the February 1982 Miami foreign government consultations.

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incidental catch of Atlantic bluefin tuna, while at the same time allowing the continued expansion of Brazil's bluefin tuna fishery. This is particularly incongruous in light of the earlier 1974 ICCAT recommendation which limited the fishing mortality; including the incidental catch, of bluefin tuna to recent levels. Cuba, which has a small bluefin tuna catch, was not at the meeting. Although Cuba is a contracting party, it too was exempt from the operation of the 1981 recommendation.

72. 16 U.S.C. § 971d (1976 & Supp. V 1981).

73. *See supra* note 22.

74. Letter from William G. Gordon, Ass't Adm. for Fisheries (NOAA), to Theodore G. Kronmiller, Dep'y Ass't Sec'y for Oceans and Fisheries Affairs, Dep't of State (Apr. 1, 1982).

75. Letter from Theodore G. Kronmiller to William G. Gordon (Apr. 14, 1982). The official ICCAT transmittal letter to the contracting parties was dated July 20, 1982. Therefore, the

Meanwhile, underscoring both the confusion and concern expressed by the domestic fishing industry and coastal states, there were two unrelated attempts to secure from NOAA the release of certain federal documents which would more accurately explain the moratorium than did the press releases issued by NMFS. First, the Commonwealth of Massachusetts sought those documents explaining how the decision of a moratorium was reached.[76] In addition, the East Coast Tuna Association, a hastily organized group of fishermen, sought more accurate information explaining the biological crisis that formed the basis for and the need of a moratorium.[77] Both were attempts to obtain documents that would reveal the data used and the decisions leading to the recommendation. Both requests for the documents and data met with little cooperation and less than complete success.[78]

While the purpose of this article is not to discuss the questionable accuracy of the data or the questioned analysis of the data which formed the basis for the extremely low stock size estimate in the western Atlantic which in turn led to the decision to propose a moratorium, it should be noted that, in recent years, the SCRS has reached different conclusions regarding the accuracy of the stock

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Secretary of State's approval of the recommendation and federal rulemaking came prior to the official ICCAT acceptance of the final recommendation. The official ICCAT transmittal letter was dated 7 days after oral argument on motion for preliminary relief filed by plaintiff U.S. fishermen in Federal District Court for the District of Massachusetts. Plaintiffs argued the invalidity of the ICCAT recommendation on numerous grounds.

76. The Commonwealth of Massachusetts responded with a Freedom of Information Act request seeking all relevant documents which might explain the immediacy of the problem and the need for such a drastic conservation measure as a two year moratorium. *See* letter from Philip G. Coates to William G. Gordon (Nov. 27, 1981). (on file with author).

77. The East Coast Tuna Association (ECTA), composed of a wholesale tuna dealer, and commercial handgear and purse seine fishermen, was organized in an attempt to challenge the validity of the biological assessments and the accuracy of the stock structure analyses. ECTA requested the biological data used to compute the stock size, and the assessment analyses. *See* letter from Frank Hester to Gerry Abrams (Feb. 19, 1982). (on file with author).

78. A majority of the documents requested by the Commonwealth were withheld by NOAA, based upon exemption (b)(5) of 5 U.S.C. § 552. This decision to deny release of identifiable documents was appealed to the Secretary of Commerce, and, despite the Secretary's concurrence in the applicability of the (b)(5) exemption, most of the withheld documents were released. *See* letter from Sherman Unger to Philip G. Coates (May 4, 1982). (on file with author).

ECTA had problems gaining access to the data tapes and the key to the data analysis. The most vexing problem was ECTA's difficulty in receiving a satisfactory answer from NMFS regarding the starting figure for determining the stock assessment. According to ECTA this figure was unnecessarily high and made the crucial difference between a negative or positive stock surplus production. ECTA retained the services of Dr. Frank J. Hester, a scientist with a PhD. in marine biology and fisheries analysis. Dr. Hester concluded in his letter, sworn and subscribed to and filed with the court by plaintiffs, that:

size assessment. For instance, in 1980, the SCRS concluded that the entire single-stock of Atlantic bluefin tuna was in "reasonably" good shape.[79] The difference between that estimate and the 1981 estimate was simply the difference between a single-stock assessment used in 1980 and the two-stock assessment used in 1981. When analyzed as two stocks, the very same data produced the different conclusion in 1981 that the eastern Atlantic stock was stable but the western Atlantic stock was not.[80] This recognition reveals that the management decision for a moratorium was based on a two-stock assumption that admittedly was not endorsed according to the United States Commissioners. The two-stock assumption arguably could support the conclusion that bluefin tuna no longer migrate over great distances but travel separately along the eastern and western Atlantic coasts.[81] This possibility appears to be the very reason why there was reluctance to pronounce two stocks of tuna which were no longer highly migratory, for to do so would adversely affect the United States juridical position which opposes national controls, and would undermine the basis for international management of Atlantic bluefin tuna. Such a result would only lend further support to the argument that Atlantic bluefin tuna should be managed on a domestic basis pursuant to the Magnuson Act.

While there were numerous proposed alternatives to the moratorium concept, NOAA did not consider any of these proposals.[82] Alter-

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> The question of bias with the assessment may never be resolved. Each time two equally plausible numbers could be used in the analysis only the one that gave the worst results was used; the other is not even discussed. Further, SCRS 81/55 omits those numbers from the text and tables, like the unaveraged starting F's, that would alert a reviewer to the fact that serious statistical problems exist with the analysis.

Letter from Frank Hester to Gerry Abrams (Feb. 19, 1982). For a discussion of rulemaking made upon questionable scientific data, see McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in SPA and OSHA*, 67 GEO. L. J. 729 (1979).

79. SCIENTIFIC COMMITTEE ON RESEARCH AND STATISTICS 80/43, 264 (1980).

80. SCIENTIFIC COMMITTEE ON RESEARCH AND STATISTICS 81/55, 5 (1981).

81. "The western Atlantic stock of bluefin tuna inhabit pelagic waters along the entire Gulf of Mexico and Atlantic coasts." NAT'L MARINE FISHERIES SERVICE, NAT'L OCEANIC AND ATMOSPHERIC ADM., FINAL ENVT'L IMPACT STATEMENT FOR THE UNITED STATES ATLANTIC BLUEFIN TUNA FISHERY V (May, 1982) [hereinafter cited as FEIS].

82. Regarding comments that the rulemaking consider bluefin tuna management under the Magnuson Act, NMFS responded that "such action . . . is not within the authority conferred by the Atlantic Tunas Convention Act, which is the legal authority for this rulemaking." 47 Fed. Reg. 25,351 (1982). In response to a comment that the definition of highly migratory species appearing at 50 C.F.R. 601.2 be amended to exclude bluefin tuna, the agency responded: "[r]evising the list would not be consistent with the Magnuson Act, and would not accomplish timely implementation of the ICCAT recommendation." *Id.* In response to numerous comments that the 1981 regulations remain in place and that the U.S. exercise its treaty objec-

natives to the proposed action deliberately were not discussed in the Final Environmental Impact Statement (FEIS), as they were considered by NOAA to run counter to the international commitments of the United States.[83] After holding the required public hearings, which elicited strong and uniform opposition from the domestic fishing industry and coastal states, NOAA issued its final rule on June 11, 1982, implementing the ICCAT recommendation.[84]

The rule was determined by NOAA not to be "major," despite its estimated negative impact of fourteen million dollars on the industry and the likelihood that the purse seine component of the fishery would be shut down and other components faced with major restrictions.[85] By its determination that the rule was not a major ruling NOAA avoided the requirement under the Federal Regulatory Flexibility Act[86] that an analysis of alternatives to the proposed rule to

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tion rights, NMFS stated: "[t]his course of action would ignore the ICCAT recommendations of November, 1981 and would be contrary to the international treaty obligations of the United States." *Id.*

83. The FEIS discussed the alternatives only on the basis of implementing the ICCAT recommendation, and did not consider objection to the ICCAT recommendation. Nor was the scientific data used as the basis for the moratorium analyzed or questioned. This was particularly unusual in light of comments received from the East Coast Tuna Association raising legitimate doubts as to the stock size analysis. *See supra* note 78.

84. 47 Fed. Reg. 25,350 (1982) established an effective date of June 10, 1982 and allowed for comments on the FEIS on or before July 6, 1982. The rule was made effective one day before the thirty day requirement of the Administrative Procedure Act, 5 U.S.C. § 553(d) (1976). While the required public hearings were held, scoping meetings were not. Scoping meetings are meetings with interested industry groups and state agencies and are required by regulations of the Council on Environmental Quality. 40 C.F.R. § 1501.7 (1982). Curiously, NOAA concluded at 47 Fed. Reg. 12,368 (1982) that "scoping meetings . . . were held by the agency on two occasions." However, as the record showed, and as was conceded by the government at oral argument and in its brief, these meetings were in fact informational meetings held by Representative William Carney in Long Island, New York, and Representative Edwin B. Forsythe in Toms River, New Jersey, to hear constituent concerns regarding amendments to the Magnuson Act to include tunas. Opening Statement of the Honorable William Carney (Montauk, New York) January 7, 1982; The News Chronicle (Moorestown, New Jersey) March 4, 1982, at 17.

85. FEIS, *supra* note 81, at 25, 80. Presidential Exec. Order No. 12,291, § 3d (Feb. 1981), requires that a regulatory flexibility analysis accompany all major rules and identify "any significant alternative to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *See* 5 U.S.C. § 603(c) (Supp. IV 1980).

86. 5 U.S.C. §§ 601-611 (Supp. IV 1980). Section 601 requires the agency to draft a regulatory flexibility analysis if the rule has a significant impact on small entities, including an identification of significant alternatives to the proposed rule which would tend to minimize such economic impacts. NMFS stated that "all of the entities affected by the proposal are small businesses or small organizations." Curiously, NMFS concluded that "therefore, alternatives are not examined with respect to mitigating the impacts on those entities relative to each other." NAT'L MARINE FISHERIES SERVICE, NAT'L OCEANIC AND ATMOSPHERIC ADM.

minimize economic burdens be developed and discussed. NOAA, therefore, made no attempt during the rulemaking to consider alternatives that would ease likely economic burdens.

During the course of its rulemaking, NOAA avoided the provisions of another federal procedural statute designed to draw the coastal states into the federal decisionmaking process, the Coastal Zone Management Act of 1972 (CZMA).[87] The CZMA, administered by NOAA, contains the requirement that federal agencies conducting activities do so in a manner consistent with state coastal zone management programs. It also contains provisions for the mediation of disputes between state and federal agencies over inconsistent federal actions in state territorial waters.[88] By not supplying Massachusetts with a consistency determination, NOAA avoided the CZMA requirement. The statute otherwise would have provided coastal states the opportunity to affect the implementation of the ICCAT recommendation with respect to their territorial waters.

In addition, of most concern to the coastal states, NOAA did not allow states such as Massachusetts a reasonable time in which to promulgate state regulations implementing the ICCAT recommendation within their own territorial waters.[89] Section 971 of ATCA re-

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DRAFT ENVT'L IMPACT STATEMENT 26 (Apr., 1982). The Small Business Administration, which is charged by statute to oversee proper compliance with this requirement, categorized NMFS's action by stating: "we believe this to be an overly narrow reading of the (Act's) requirements." Letter from Frank S. Swain, Chief Counsel for Advocacy, to NMFS (May 24, 1982) (on file with author).

87. 16 U.S.C. §§ 1451-1464 (1972 & Supp. IV 1980). The Coastal Zone Management Act requires that federal agencies conducting activities which directly affect the coastal zone do so in a manner, to the "maximum extent practicable consistent with approved state management programs." 16 U.S.C. § 1456(c)(1). The definition of coastal zone includes "coastal waters." 16 U.S.C. § 1453(a). 15 C.F.R. 930.34(a) (1983) places an affirmative burden on federal agencies to "provide state agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity." The Coastal Zone Management Act and implementing regulations are administered by NOAA, and NMFS's obligation to adhere fully to the federal consistency regulations was noted by NOAA: "As a result, meticulous attention must be paid to this requirement within NOAA, since our own attitude and actions will naturally be an example for the rest of the federal government." Memorandum of William Brewer, NOAA General Counsel, to Robert W. Schoning, Director, and others (June 7, 1977). Regarding the failure of Massachusetts to receive a federal consistency determination see Affidavit of Joseph E. Pelczarski (July 21, 1982) (on file with author).

88. 16 U.S.C. §§ 1456(c)-1456(d) (1976 & Supp. IV 1980).

89. 47 Fed. Reg. 25,360 (1982), codified at 50 C.F.R. 285.1(d) (1982), preempted the authority of Atlantic coastal states over territorial waters without waiting the reasonable period of time as set forth in 16 U.S.C. § 971(d). These regulations contained the determination by the Assistant Administrator of NMFS that the regulations were to apply within the territorial waters of Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, New York, Massachusetts, New Hampshire, Maine, Puerto Rico and the Virgin Islands.

quires that after the promulgation of federal regulations implementing an ICCAT recommendation NOAA allow states a reasonable period of time to promulgate state regulations implementing the recommendation in territorial waters.[90] This provision, in effect, precludes the application of federal authority within waters under direct state control so long as the state regulations are consistent with and otherwise implement the ICCAT recommendation. In fact, NOAA had allowed such a reasonable time in past rulemakings implementing ICCAT recommendations.[91] By not allowing a reasonable time for the states to implement the ICCAT recommendation, it appears that NOAA improperly preempted state authority contrary to the statute and past NOAA actions.

The implementation of the recommendation by NOAA had serious economic consequences for the domestic Atlantic bluefin tuna fisherman who was prohibited, for all practical purposes, from continuing traditional commercial fishing for the Atlantic bluefin tuna. In fact, operations of many individual fishermen, particularly the purse seiners, were shut down. Wholesale distributors of Atlantic bluefin tuna who shipped directly to the Japanese markets were prohibited from satisfying these markets. Tourist revenues generated in coastal areas in the form of charter boat and party boat fees were affected as well.

Exacerbating the fishermen's bitter feelings regarding the swiftness and lack of notice preceding the ICCAT recommendation was the manner in which NOAA ran roughshod over procedural statutes designed to involve the industry in the decisionmaking process of the rulemaking. This was particularly true of NOAA's deliberate disregard of proposed alternatives to the moratorium that would lessen the economic harm that was to follow its regulations. As a result,

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90. 16 U.S.C. § 971(g) authorizes the federal preemption of state waters after notice to the affected state and opportunity for a hearing if a state "has not, within a reasonable period of time after the promulgation of regulations pursuant to this chapter, enacted laws or promulgated regulations which implement any such recommendation of the Commission within the boundaries of such state."

91. When implementing the last recommendation of the Commission in 1975 NMFS informed the Commonwealth of Massachusetts: "Federal regulations governing Atlantic bluefin tuna, initially effective only in Federal waters beyond the three mile limit, will take effect in state waters if, within a reasonable period of time after their promulgation, the state does not implement regulations of comparable effectiveness." Letter from Robert Schoning, NMFS Ass't Adm. to Gov. Michael Dukakis (May 24, 1976). In clarifying the determination made by NMFS of the application of federal regulations in state waters, NOAA again stated "we must wait for a reasonable period of time after our own regulations are in effect before making this determination." Letter from NOAA's Chief Counsel for Living Marine Resources to NMFS Acting Assoc. Dir. for Resource Management (February 25, 1976).

two separate law suits were filed by aggrieved fishermen[92] in an attempt to restrain the operation of the rule and to obtain a declaration that the ICCAT recommendation itself was invalid.[93]

The following section discusses the litigation and shows how the domestic fishing industry was further frustrated in its efforts to secure some form of relief. The section intends to show that the inability to obtain judicial review of international management decisions further supports the conclusion that Atlantic bluefin tuna should be managed on a domestic basis within the framework of the Magnuson Act.

VI. LITIGATION: THE *FERRANTE* CASE

Prior to the initiation of the rulemaking process which would normally precede a final decision, the management decision for a two-year moratorium had already been made. It must be emphasized that the end result, a domestic regulation imposing a moratorium on an entire industry, was a *fait accompli* as soon as the ICCAT recommendation was finalized in Miami, Florida. Thereafter, the public notice, hearing, and comment processes and all domestic procedural statutes designed to afford interested parties an opportunity to affect the decision were rendered meaningless in effect. To be sure, NOAA went through some of the technical motions.[94] NOAA, however, refused to acknowledge any discretion in the rulemaking. In addition, NOAA's previous actions evading requirements of such procedural statutes as the Coastal Zone Management Act, the Regulatory Flexibility Act, and the National Environmental Policy Act[95] left little doubt in the public's mind as to NOAA's intention to implement the ICCAT recommendation summarily.[96] Herein lies the

92. The Commonwealth of Massachusetts intervened as an *Amicus curiae.*

93. A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982); Sea Rover Fishing, Inc. v. Dep't of Commerce, No. 82-1814 (D.C. Cir. filed June 29, 1982).

94. 47 Fed. Reg. 12,367 (1982) Notice of Intent to Prepare an Environmental Impact Statement; 47 Fed. Reg. 17,086 (1982) Notice of Proposed Rule; 47 Fed. Reg. 14,501 (1982) Notice of Public Meetings.

95. 42 U.S.C. §§ 4321-4347 (1969 & Supp. IV 1980). The National Environmental Policy Act requires that alternatives to the proposed action be thoroughly discussed in the Environmental Impact Statement, and that the public be given an early and meaningful opportunity to participate in and affect the deliberative process. *See also* 40 C.F.R. §§ 1501.7, 1508.14.

96. 47 Fed. Reg. 25,350 (1982) states:

> "The Act directs the Secretary of Commerce to promulgate regulations necessary to implement recommendations adopted by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and to carry out the purposes and objectives of

major flaw with international management of Atlantic bluefin tuna: a decision having major economic repercussions on the domestic fishing industry may be made without prior notice; the basis for that decision may be formed in some other part of the world not accessible to the fishermen; and there is no prospect of assurance that the implementing authority in the United States will take any action other than implementing the recommendation in its entirety.

Frustrated by both the surprising swiftness of the ICCAT recommendation and the lack of accountability for the rulemaking through which it was implemented, aggrieved parties filed suit in the United States District Court to challenge the implementation of that recommendation. In *A. A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr.*,[97] the plaintiffs, a domestic purse seine fisherman of Atlantic bluefin tuna and a fish wholesaler who purchased Atlantic bluefin tuna for shipment to Japan, sought a temporary restraining order against the operation of the rule implementing the ICCAT recommendation; a reinstitution of the regulations that were in effect prior to the 1981 ICCAT recommendation; and a declaration by the court that the ICCAT recommendation itself was invalid as being neither developed in accordance with the Convention nor implemented in accordance with ATCA.

The plaintiffs' suit in *Ferrante* raised the following legal issues: first, was there a valid ICCAT recommendation; and, second, if so, must it be and was it implemented in accordance with domestic procedural law? The underlying question, intrinsic to the problems of international management, was the extent to which a party can obtain judicial review of an international recommendation which has potentially severe domestic economic impacts and imposes significant domestic fines and penalties for non-compliance, when that recommen-

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the Convention." NMFS concludes: "Thus NMFS is legally obliged to implement the ICCAT recommendation, both as a result of NMFS' responsibilities on behalf of the U.S. under the treaty and on behalf of the Secretary of Commerce under the tunas Act."

FEIS, *supra* note 81, at 78.

97. No. 82-1872-T (D.C. Mass. filed July 2, 1982). In addition to the *Ferrante* case, a similar civil action was simultaneously commenced in the Federal District Court for the District of Columbia. Sea Rover Fishing, Inc. v. Department of Commerce, Civil Action No. 82-1814 (D.C. Cir.). The District Court of Massachusetts transferred Civil Action No. 82-1872-T for consolidation with Civil Action No. 82-1814 in the Federal District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a). Subsequent to this transfer, the original plaintiffs in *Sea Rover* filed a voluntary motion to dismiss. Civil Action No. 82-1814 was thereupon dismissed without prejudice by the Federal District Court for the District of Columbia.

dation is implemented by rulemaking conducted with no opportunity for industry involvement in the decisionmaking process.[98]

The plaintiffs did not prevail in *Ferrante*. The Federal District Court for the District of Columbia held that a temporary restraining order of the type sought would intrude deeply into the core concerns of the executive branch, which through the Department of State, had approved ICCAT's international recommendation. The court required the plaintiffs to meet an extraordinarily strong showing of success on the merits. Upon the plaintiffs' failure to meet this high burden, the court denied the plaintiffs' motion for a temporary restraining order.[99]

The *Ferrante* case raises many of the problems inherent in the current management of the Atlantic bluefin tuna. The following sections of this article will discuss in detail the legal issues raised in that litigation.

A. The Parties' Arguments

In challenging the effectiveness of the ICCAT recommendation, plaintiffs argued that the recommendation resulting from the foreign government consultations in Miami, Florida, was nothing more than a trilateral agreement reached between three contracting parties to the Convention which was prematurely approved by the State Department before it was ratified by the full ICCAT Commission. Plaintiffs also argued that the recommendation was approved by the State Department prior to the public hearing requirements of ATCA, thereby negating the public's ability to alter the recommendation through the public hearing process, and that the recommendation was not formally transmitted by the Commission to all of the contracting parties as required by the Convention.[100]

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98. 16 U.S.C. § 971e(e)(1) provides civil penalties for violations of the regulations of not more than $25,000 for the first offense and not more than $50,000 for any subsequent offenses. During the week of August 15, 1982 a Gloucester, Massachusetts handgear fisherman was cited by NMFS enforcement agents for allegedly catching three giant Atlantic bluefin tuna in violation of 50 C.F.R. § 285.32(a) which established a catch limit of one tuna per week. Nat'l Marine Fisheries Serv. Press Release (Aug. 23, 1982). This case was concluded before an Administrative Law Judge of the United States Department of Commerce on July 29, 1983. The Judge imposed a civil fine of $150,000 for four violations. In The Matter of James Britton No. 244-139, 244-149 (July 29, 1983).

99. A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

100. Plaintiffs argued:

"The quota that it is imposing on the U.S.-based commercial bluefin tuna fishery is

Plaintiffs further focused directly on the issue of foreign vessels in the United States two-hundred-mile waters, thereby challenging the international management framework itself. In support of this challenge plaintiffs noted that ATCA requires NOAA to assess the nature and effectiveness of the measures taken by other ICCAT contracting parties to ensure compliance by that country's fishermen with past ICCAT recommendations. ATCA also requires that NOAA issue a statement along with the final rule containing the results of the assessment.[101] The fishermen pointed out that there was no such statement accompanying the rulemaking in this case.[102] Based on the facts known to NOAA which tended to show that the Japanese were not fulfilling their ICCAT commitments, plaintiffs implied that the issuance of such a required statement could have shown that the

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not an ICCAT recommendation under that statute. It is a voluntary self-imposed limit negotiated among the United States, Japan, Canada and Brazil. NMFS has ignored the substantive and procedural requirements of the Tunas Act and the Administrative Procedure Act, as well as the National Environmental Policy Act, the Regulatory Flexibility Act and Executive Order 12291."

Brief for Plaintiffs at 11, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982). The argument continued by stating: "Unless the limits agreed upon in February 1982 by four nations are submitted to ICCAT, subjected to Article VIII's process, transmitted to this nation by ICCAT, and favorably acted upon by the Secretary of State, NMFS has no legal authority to implement those limits under the Tunas Act, as it claims." *Id.* at 13. At the time of the litigation there was nothing in defendant's administrative record submitted to the court to show favorable action by the full Commission of the Miami consultations or a written transmittal letter to the Contracting Parties. *See supra* text and notes at notes 69, 74, 75.

101. ATCA requires that the rulemaking be accompanied by "a statement, based on inquiries and investigations, assessing the nature and effectiveness of the measures for the implementation of the commission's recommendations which are being or will be carried out by countries whose vessels engage in fishing the species subject to such recommendations within the waters to which the Convention applies." 16 U.S.C. § 971d(c)(2) (1982).

102. The preamble of the final rule stated in pertinent part: "Officials agreed to recommend to their governments the following measures for 1982 and 1983 to implement the ICCAT recommendations on Atlantic bluefin tuna management in the western Atlantic Ocean." The preamble concluded that: "Japan implemented the ICCAT recommendation for its nationals on March 3, 1982, and Canadian regulations will be in place before bluefin fishing commences in Canadian waters." 47 Fed. Reg. 25,351 (1982).

The rule continued by stating:

> "Officials also agreed to recommend to their governments . . . measures to implement the ICCAT recommendations on Atlantic bluefin tuna management in the western Atlantic Ocean . . . Officials also agreed to recommend to their governments that they immediately initiate steps necessary to implement the management measures agreed upon in these consultations . . . Under ICCAT, each member nation has the responsibility to implement ICCAT recommendations for its own nationals. NOAA's legal authority under the Atlantic Tunas Convention Act is limited to implementing recommendations of ICCAT through regulations pertaining solely to the domestic fishery."

Id.

Japanese fishing effort posed a serious threat to the achievement of ICCAT recommendations.[103] If such a showing could be made, they argued, the Secretary of Commerce pursuant to ATCA could suspend the regulations.[104]

The plaintiffs, however, failed to emphasize to the *Ferrante* court that international management of marine fisheries requires that each participating nation be assured that the remaining nations are mutually complying with the particular ICCAT recommendations. Without cooperative uniformity, one nation's fishermen will profit at the expense of fishermen from another nation, and overall resource management will suffer due to a decreased effectiveness of the recommendation. In this case, the evidence before NOAA suggested that past voluntary efforts of the Japanese to restrict their catch to recent levels of fishing mortality, as required by the 1975 ICCAT recommendation, had been unsuccessful. In addition to this excessive catch rate, further information available to NOAA evidenced significant underreporting of catch rates by the Japanese.[105] Despite these two statistical indications, the proposed and final NOAA rules did not contain the required statements assessing the effectiveness or lack thereof of past measures taken by the Japanese to adhere to the 1975 ICCAT recommendation. The above facts suggest that had the required statement been made and issued together with the regulation, which had the effect of shutting down the United States Atlantic bluefin tuna industry, the United States would appear to have been undermining its own fishing industry for the benefit of foreign interests.

While the statutory requirement to make such a statement might be considered by some to be a technicality, others regard it as a more

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103. Japanese longline catch in numbers of Atlantic bluefin tuna in 1975 was 7,995, jumped to 24,277 in 1976, and was 30,558 in 1977. ATLANTIC BLUEFIN TUNA RESOURCE UPDATE, *supra* note 61, at 15.

104. 16 U.S.C. § 971c (1976).

105. A report issued by NMFS in 1982 concluded:

> "Another serious problem is the differences between the Japanese reported catch rates and the catch rates computed from observer data. For example, six out of seven catch rates reported by the Japanese for the Atlantic and five out of the seven reported rates for the Gulf of Mexico were lower than catch rates calculated from observer records. For the majority of these, the Japanese reported catches were significantly lower than those reported by the observers. These differences are apparently real. Observers aboard the vessels have compared their daily catch records with those maintained by the Japanese, and in almost every instance, they reported that the Japanese catches are less than those they recorded."

serious statutory violation. The domestic fishing industry is not in a position to ascertain the degree to which other contracting parties comply with prior ICCAT reccommendations. Only NOAA has the ability to monitor this requirement, which is critical to the effectiveness of any ICCAT recommendation. Congress was no doubt aware of this when it imposed upon the agency the duty to make the necessary investigations and issue an appropriate statement regarding its findings. The omission of this statement was particularly important here: NOAA, upon effectively putting the domestic fishermen out of business, should have informed the fishermen of any consistent or inconsistent conservation efforts by other contracting parties.

The government's argument in *Ferrante* relied almost entirely upon considerations of foreign policy and international relations. The government first noted that the court should be cognizant of the fact that the rulemaking arose within a political context. The government argued that under the Administrative Procedure Act the proper scope of judicial review of procedural errors in the implementation of the ICCAT recommendation was whether the agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[106] The government then proposed the novel theory that the court's review of the procedural improprieties should be "tempered" because of the foreign policy implications underlying the regulations.[107] The government argued that judicial review of the substantive issues was limited to determining whether the rulemaking was consistent with the ICCAT recommendation.

Responding to the plaintiff's challenge to the United States' overall quota and the Secretary of State's refusal to object to the rule, the government stated that both claims were rooted in foreign policy and international considerations and were therefore not susceptible to judicial review.[108] In a supplemental memorandum, the government asserted that the critical issue in the litigation was whether there could be judicial review of the Secretary of Commerce's consultation with the Secretary of State on whether to ob-

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106. 5 U.S.C. § 706(2)(A) (1976). The government cited Environmental Defense Fund v. Costle, 657 F.2d 275 (D.C. Cir. 1981), and City of Westfield v. FPC, 551 F.2d 468 (1st Cir. 1979) for this highly deferential standard of judicial review.

107. Brief for Defendants at 18-20, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

108. *Id.* at 18.

ject to the ICCAT recommendation.[109] The government concluded that both the political question doctrine and the doctrine of agency action committed by law to agency discretion were applicable to the case, and that either one was sufficient to support a finding of nonreviewability.[110]

In response to the plaintiffs' motion for a temporary restraining order, the government asserted that a stay of the regulations on any grounds would place the United States in violation of its international obligations to manage Atlantic bluefin tuna and would be contrary to its international treaty commitments under the ICCAT Convention.[111] Plaintiffs replied that a stay of the regulations would not be inconsistent with United States international agreements to implement the recommendation since the recommendation itself stated that its provisions should be implemented in accordance with the regulatory procedures of each country.[112] Plaintiffs contended that if they could establish the existence of procedural irregularities in their preliminary motion to enjoin, a stay of the regulations would have been consistent with the language of the recommendation.

B. The Case Law Relied Upon by the Parties

The parties cited two different cases as governing the proceedings for preliminary relief before the district court. First, the plaintiffs cited *Hopson v. Kreps*,[113] in which the Ninth Circuit Court of Appeals held justiciable the issue of whether the International Whaling Commission exceeded its jurisdiction under the International Whaling Convention.[114] The government relied on *Jensen v. National Marine Fisheries Service (NOAA)*,[115] in which the District of Columbia Court

109. Supplemental Memorandum for Defendants at 3, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

110. Brief for Defendants at 19-20, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

111. *Id.*

112. The fifth recommendation stated: "That the Governments of Canada, Japan and the United States take steps to implement these provisions as soon as possible and simultaneously in accordance with the regulatory procedures of each country." Letter from O. Rodriguez-Martin, ICCAT Executive Secretary to the Secretary of State (July 20, 1982). If, as the government alleged, implementation of the ICCAT recommendation was a "crucial" effort necessary to conserve the bluefin stocks, NOAA should have given meticulous attention to all domestic procedural law. *See* Brief for Defendants at 20, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

113. 622 F.2d 1375 (9th Cir. 1980).

114. International Convention for the Regulation of Whaling, December 2, 1946, 63 Stat. 1716, T.I.A.S. No. 1849, 4 Bevans 248.

115. 512 F.2d 1189 (D.C. Cir. 1975),

of Appeals held that the Secretary of State's decision not to object to regulations proposed by the International Halibut Commission was a political question and was therefore not justiciable.[116] Unfortunately, the *Ferrante* court decided the case on the issue of the threshold burden of proof for preliminary relief, and therefore offered little guidance on the applicability of the political question doctrine, or the proper role of judicial review of international decisions regarding the management of highly migratory marine fisheries.

The *Jensen* case, decided in 1975, involved an action by plaintiffs seeking a declaratory judgment and injunctive relief against the enforcement of a regulation adopted pursuant to the International Pacific Halibut Convention.[117] The Convention provided that regulations approved by the Pacific Halibut Commission must receive the approval of the President in order to be effective in the United States. The *Jensen* court affirmed the lower court's dismissal of the action for lack of jurisdiction, holding that the President's approval of the regulations constituted agency action committed by law to agency discretion, and was therefore nonreviewable under the Administrative Procedure Act.[118] Unlike *Jensen*, however, the *Ferrante* case did not involve Presidential approval of regulations adopted by a bilateral international Commission. *Ferrante*, while involving State Department approval of an international recommendation, was in essence a federal agency rule made after opportunity for notice and comment. *Jensen* is distinguishable from *Ferrante* because it did not involve rulemaking; judicial review of the international recommendation in *Jensen* was appropriately barred by the Administrative Procedure Act since it involved Presidential action in the field of foreign affairs. The *Jensen* court correctly held that Presidential approval of an international recommendation which

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116. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, United States-Canada, 5 U.S.T. 5, T.I.A.S. No. 2900.

117. The Northern Pacific Halibut Act, 16 U.S.C. §§ 772-772j (1937), provides criminal penalties for the violation of any regulation established by the Commission.

118. 5 U.S.C. § 701(a) (1976). The court stated that "presidential action in the field of foreign affairs is committed to presidential discretion by law." 512 F.2d 1189, 1191 (1975). The court cited Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), and United States v. Curtis-Wright Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), and concluded that "it follows that the APA does not apply to the action of the Secretary in approving the regulation here challenged." (The Presidents' authority was delegated to the Secretary of State by Executive Order No. 11467, May 1, 1969, 34 Fed. Reg. 7271). 512 F.2d 1189, 1191 (1975). The court clarified its holding by stating that a political question does not present a case or controversy within the meaning of Article III of the Constitution. *Id.*

proscribed certain domestic activity constituted a foreign affairs decision committed to executive discretion by law.

At issue in *Ferrante*, however, were federal agency regulations promulgated pursuant to the Administrative Procedure Act. These regulations allegedly were necessary and appropriate to carry out an international recommendation. Thus, the agency's exercise of discretion in defining the substance of the regulations in *Ferrante* was entitled to judicial review, whereas Presidential approval of a recommendation committed by law to his discretion does not afford judicial review of the substance of that recommendation. Therefore, agency promulgation of regulations is not political in nature as is the executive approval of a recommendation. The appropriate scope of judicial review in the *Ferrante* case should have been whether the regulations of the Secretary of Commerce were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[119]

In support of its nonjusticiability claims in *Ferrante*, the government also cited the Ninth Circuit case of *United States v. Decker*.[120] The *Decker* case, like *Jensen*, involved regulations developed by an international body, the International Pacific Salmon Fisheries Commission.[121] The Commission's regulations, like those of the Pacific Halibut Commission in *Jensen*, required executive approval to be effective in the United States. There were no agency rulemaking provisions governing implementation of the regulations. The *Decker* court noted that the case before it, like *Jensen*, involved regulations

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119. 5 U.S.C. § 706(2)(A) (1976).

120. 600 F.2d 733 (9th Cir. 1979). In its brief the government noted: "the court of appeals stated that it might be better to characterize *Jensen* as holding that the Executive's decision not to file an objection was unreviewable as 'agency action committed to agency discretion by law' rather than as being simply based on the political question doctrine. We believe that both nonreviewability doctrines apply to the facts of the instant action, but of course, either is sufficient to support a finding of nonreviewability." Supplemental Memorandum of Defendants at 4, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-1872-T (D.C. Mass. filed July 2, 1982).

121. Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System May 26, 1930, United States-Canada, 50 Stat. 1355, TS918, 6 Bevins 41. Article I of the Convention established the International Pacific Salmon Fisheries Commission. The Commission was authorized to develop regulations to achieve sufficient escapement of salmon each year to conserve the stocks, and to allocate the allowable catch between Canada and the United States. Article VI provides that the regulations must be approved by each government. The Sockeye Salmon or Pink Salmon Fishing Act of 1947 makes it unlawful in the United States to violate any regulation of the Commission. 16 U.S.C. § 776(a) (1976). Appellants in *Decker* were salmon fishermen challenging their convictions for violating the regulations. The government argued that the political question doctrine precluded judicial review of the regulations under which plaintiffs were convicted.

promulgated by an international Commission established by a convention between the United States and Canada.[122] Nevertheless, the *Decker* court distinguished *Jensen* on the grounds that the latter case involved a claim that executive approval of the international regulations was arbitrary. The *Decker* court concluded that "[i]n those few cases involving interpretation of treaties when the political doctrine precludes review, that doctrine has narrow confines. The principal area of nonjusticiability concerns the right of the executive to abrogate a treaty."[123]

In *Ferrante,* no issue of the executive abrogation of a treaty arose; therefore the issues of nonjusticiability raised in *Decker* should not have influenced the outcome in *Ferrante*. However, the *Decker* court did review the authority of the executive to approve partially the international regulations by construing the treaty, the effect of the Commission's emergency order, and the lack of the Canadian government's approval of the regulations. Thus, the *Decker* court did review issues having foreign policy implications; the *Ferrante* court, therefore, could have conducted a similar review of the administrative rulemaking record before it even though foreign policy considerations were involved. What was before the court in *Decker* and *Jensen* was the international recommendation itself as approved by the executive, and not, as in *Ferrante*, a regulation promulgated by an administrative agency pursuant to a rulemaking procedure. This is an important distinction that apparently escaped the attention of the *Ferrante* court. Furthermore, the *Decker* court did not avoid review of the executive's action on the international recommendation. The *Ferrante* court therefore had no justification on the basis of the *Decker* decision for not reviewing an agency rule implementing an international recommendation.

In 1980, the Ninth Circuit Court of Appeals clarified the *Decker* holding in the case of *Hopson v. Kreps.*[124] *Hopson,* cited by plaintiffs in *Ferrante,* involved a controversy arising from the international

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122. 600 F.2d 733, 777 (9th Cir. 1979).

123. Id. In a footnote the court referred to the language of Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed.2d 663 (1962):

> "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility of judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

600 F.2d. 733, 737-738.

124. 622 F.2d 1375 (9th Cir. 1980).

management of the bowhead whale under the 1946 International Whaling Convention.[125] Article V of the Convention authorized the International Whaling Commission to establish a detailed set of regulations, or "schedule." The Whaling Convention Act of 1949 provided that the regulations of the Commission were to be submitted for publication in the Federal Register and would become effective with respect to all United States whaling vessels in accordance with the terms of the schedule and the provisions of the Convention.[126]

The particular question before the *Hopson* court was whether the Commerce Department had exceeded its authority in promulgating the regulations. The court concluded that resolution of the issue merely required a determination of whether the agency had exceeded its statutory authority, a question that was clearly susceptible to judicial review.[127] The court noted that when a treaty is not self-executing, it is the implementing legislation and not the treaty itself, which operates as the law of the land.[128] Thus, despite the existence of a treaty, the *Hopson* court held that the plaintiff did not lack jurisdiction to seek review of the validity of the Commerce Department's implementing regulations.[129]

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125. International Whaling Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 4 Bevans 248. The Convention established the International Whaling Commission and vested in it the authority to establish protected and unprotected species, open and closed seasons, open and closed waters, size limits, fishing methods, and gear restrictions to govern the international whaling industry.

126. 16 U.S.C. §§ 916-916l (1970). There are no provisions in the Act for notice and comment opportunities prior to publication. The Act authorizes the Secretary of the Department of Commerce to "adopt such regulations as may be necessary to carry out the purposes and objectives of the convention, the regulations of the Commission, this chapter and with the concurrence of the Secretary of State, to cooperate with the duly authorized officials of the government of any party to the Convention." 16 U.S.C. § 916j.

127. 622 F.2d 1375, 1378-1379 (9th Cir. 1980). Plaintiffs also contended that the Commerce Department issued the regulations in violation of the procedural and substantive requirements of the Marine Mammal Protection Act, 16 U.S.C. §§ 1401-1407 (1972), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1973).

128. 622 F.2d 1375, 1381 (9th Cir. 1980), citing Z&F Assets Realization Corp. v. Hull, 311 U.S. 470 (1941). The court noted: "The emphasis placed on the relationship between the grant of power and the conduct of American foreign policy lends support to the view that the nature of the grant of power is an important consideration in resolving issues of reviewability." 622 F.2d 1375, 1381 (1980).

129. 622 F.2d 1375, 1382 (9th Cir. 1980). The court was reluctant to address this issue, noting that it "raises substantial questions as to the proper reconciliation of the holdings [in *Decker* and *Jensen*]." "Although *Decker* does not specifically address a reviewability contention, we were willing in that case to look behind the Secretary's decison to accept the treaty regulations of an international commission at least to the extent of determining whether he had accepted them in accordance with the terms of the treaty." *Id.* In a footnote, the court distinguished administrative power to accept regulations of an international Commission that

The *Hopson* court clarified its holding in *Decker* by noting that the question of whether or not the schedule was lawfully approved by the executive and therefore enforceable pursuant to the Whaling Convention Act did not constitute a nonreviewable political question simply because review would require the interpretation of a treaty or have a potential impact on United States external affairs.[130] The court found support for this conclusion in *Baker v. Carr,*[131] in which the Supreme Court provided the following six-factor inquiry for determining when a case with foreign affairs implications should be considered a nonreviewable political question:

> Prominent on the surface of any case held to involve a political question is found: a textually demonstrable constitutional commitment of the issue to a coordinate political department; or . . . a lack of judicially discoverable and manageable standards for resolving it; or . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or . . . an unusual need for unquestioning adherence to a political decision already made; or . . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[132]

Relying on this language in *Baker,* the *Hopson* court rejected the government's assertion that executive approval of the schedule was nonreviewable under *Baker* simply because the executive historically had managed the bowhead whale.

In both *Hopson* and *Ferrante,* plaintiffs challenged the validity of regulations of the Department of Commerce under the enabling statutes pursuant to which those regulations were made effective in

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is conferred by a treaty and power that is conferred by a statute. In the *Ferrante* case, unlike *Decker*, the power was conferred by statute.

The court declined to affirm the judgment of the lower court on the alternative ground advanced by the government that the Secretary of State's decision not to object to the Commission regulations was action which the Whaling Convention Act committed to his unreviewable discretion. The court refused to do so noting that the issue was neither briefed by the parties nor fully addressed by the district court. For a discussion of this holding and its impact on the political question doctrine see Roberts, *Bowhead Whales, Alaskan Eskimos, and the Political Question Doctrine,* 9 HASTINGS CONSTIT. L.Q. 231-255 (1981).

130. 622 F.2d 1375, 1378 (9th Cir. 1980).

131. 369 U.S. 186 (1962).

132. *Id.* at 217. Although the *Baker* case concerned domestic affairs, the Supreme Court nonetheless engaged in a political question analysis. The Court noted that questions of foreign relations "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature" and often "uniquely demand single-voiced statement of the Government's views." *Id.* at 211.

the United States. Furthermore, plaintiffs asserted in both cases that the Department of Commerce had violated provisions of other domestic statutes in the process of making the regulations effective. The *Hopson* case clearly was applicable to the situation presented in *Ferrante*. Unfortunately, instead of applying *Hopson*, the *Ferrante* court applied another case, *Adams v. Vance*,[133] in which the court held that a party must be able to make an extraordinarily strong showing of success on the merits in order to obtain temporary provisional relief. Relying on the *Adams* decision, the *Ferrante* court denied plaintiffs' motion for a temporary restraining order enjoining the operation of the 1982 NOAA rule.

Ferrante is distinguishable from *Decker* and *Jensen* since the power to accept the international recommendation in *Ferrante* was conferred by statute. An important fact relied upon by the *Hopson* court was whether the power to accept was granted pursuant to a treaty or a statute. In *Ferrante,* the international recommendation was translated into law only after agency rulemaking with opportunities for notice and comment. In that case, the rulemaking was the subject of review, and not an international recommendation approved by the executive. Thus, the court could have reviewed the administrative record compiled in the course of the agency rulemaking process. The *Hopson* court's holding that the International Whaling Commission's actions under the International Whaling Convention were subject to judicial review certainly applies to *Ferrante*. Under *Hopson,* the *Ferrante* case is clearly justiciable and susceptible to judicial review.

Instead of reviewing the validity of the agency rulemaking process the *Ferrante* court abrogated its duty to settle an issue of statutory construction simply because foreign policy implications were involved. Thus, judicial review was denied even though the record disclosed gross procedural errors, agency noncompliance with statutes designed to include the public in the decisionmaking process, and agency refusal to release relevant information to the public. The mere existence of an international treaty ought not be enough to preclude judicial review; the political question doctrine should not be invoked when its application would render an entire case nonjusticiable by independently applying the *Baker* criteria and finding them applicable to the facts. In the management of highly migratory species, the federal agency charged with the duty of implementing

133. 570 F.2d 950 (D.C. Cir. 1978).

an international management recommendation through rulemaking should not be allowed to deliberately circumvent domestic procedural statutes designed to involve the regulated industry in the decisionmaking process.

The *Ferrante* court's stance on these issues, however, was ultimately unclear. The district court's opinion in *Ferrante*, issued the day after oral argument, held that the plaintiffs had failed to make an extraordinarily strong showing of success on the merits and denied the motion for a temporary restraining order, without addressing the political question doctrine or review of the procedural allegations.

C. The Ferrante Court's Holding: Description and Analysis

Instead of relying on *Hopson,* the *Ferrante* court based its rationale on the case of *Adams v. Vance.*[134] The *Adams* case involved an action to compel the Secretary of State to file an objection to regulations adopted by the International Whaling Commission. A special consideration noted to be weighing against plaintiffs in *Adams* was the fact that an objection would substantially endanger the foreign relationships of the United States. The *Adams* court felt that application of the discriminating analysis set forth in *Baker* would be difficult in the case before it because deadline pressures had resulted in an abbreviated record and incomplete briefing of all issues.[135] The *Adams* court then vacated an order of the district court requiring the Secretary of State to object to the recommended regulations. The court explained that any party seeking injunctive relief which "deeply intrudes into the core concerns of the executive branch" would have to make an "extraordinarily strong showing" to obtain such relief.[136] The court found that the plaintiffs in *Adams* had failed to make such a showing.

Skirting the issue of justiciability, the *Adams* court further denied plaintiffs' motion for a temporary restraining order against the enforcement of the regulations.[137] The court noted, however, that

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134. *Id.*

135. *Id.* at 954.

136. *Id.* The circuit court cited Mitchell v. Laird, 159 U.S. App. D.C. 344, 488 F.2d 611 (1973), in which the court found that a request for an order directing action by the Secretary of State in foreign affairs plainly constituted an "intrusion into the core concerns of the executive branch." *Id.*

137. 570 F.2d 950, 955-956 (D.C. Cir. 1978).

there was little dispute that the plaintiffs had presented serious legal questions tending to show a substantial case, particularly with respect to the government's failure to consider possible alternatives to the proposed action.[138] The court did not review the issue of the government's alleged failure to comply with certain domestic statutes, including the National Environmental Policy Act, because it felt that plaintiffs' request for an injunction requiring the Secretary of State to object to the international recommendation constituted an improper remedy.

In contrast to the plaintiffs' prayer for relief in *Adams*, the plaintiffs in *Ferrante* did not request an injunction requiring the Secretary of State to object to the ICCAT recommendation; thus, plaintiffs' action in *Ferrante* did not amount to an intrusion into the core concerns of the executive. The *Ferrante* plaintiffs requested only a stay of the regulations and a reinstitution by NOAA of the 1981 regulations pending judicial review of the rulemaking record and the merits of the case.[139] Assuming that the balance of equitable factors favored such an injunction,[140] the remedy requested in *Ferrante* merely would have preserved the status quo. The "extraordinarily strong showing" required by the *Adams* court to enjoin the Secretary of State to take affirmative action should not have applied to judicial review of the rulemaking record in *Ferrante*.

The issue in *Ferrante* was domestic in nature: it was brought by domestic fishermen to restrain the operation of a federal rule proscribing certain activities of the domestic fishing industry, and was based on an allegation that the rule was outside the scope of the enabling statute and in violation of numerous other domestic statutes. To suggest, as did the district court, that the plaintiffs were required to make an "extraordinarily strong showing" in order to obtain the requested relief is an incorrect application of the *Adams* case and a clear abrogation of the court's traditional function of judicial review. In holding that the plaintiffs failed to meet their burden under the extraordinarily strong showing standard the court skirted

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138. *Id.* at 955.

139. The *Ferrante* court stated that the plaintiffs "challenge the entire process by which the regulations were placed in force as being not in accordance with law and suggest that the regulations superseded by those at issue, i.e. the 1980-81 regulations, should be reinstated." Ferrante v. Peterson, No. 82-2163, 3 (D.C. Cir. filed June 29, 1982).

140. The judge in *Ferrante* found that the plaintiffs "have demonstrated that they are likely to suffer immediate and irreparable injury if a preliminary injunction is not granted." *Id.* at 5.

review of the political question doctrine as well as the fishermen's appeal for judicial relief.[141]

Plaintiffs in *Ferrante* did not seek an order directing the Secretary of State to object to the ICCAT recommendation; the plaintiffs framed the legal issues and the remedy sought in such a way as to render the extraordinarily strong showing standard inapplicable. Reinstitution of the 1981 regulations merely would have maintained the status quo pending litigation. And although the *Ferrante* court acknowledged that the *Hopson* case "appears to go farther than any other case in holding that environmental regulations adopted pursuant to treaty are not immune from judicial scrutiny solely because they are political," it nevertheless failed to apply that case in reaching its decision.[142]

The *Ferrante* case may be read as standing for the proposition that plaintiff fishermen challenging the validity of domestic regulations promulgated to implement an international recommendation are unlikely to obtain interim relief pending judicial review of the administrative rulemaking record. The court's refusal to provide judicial review, merely because of potential foreign policy implications, constitutes an inappropriate abrogation of its traditional function of reviewing questions of statutory authority.

D. The 1982 ICCAT Developments

In November, 1982, approximately four months after the district court issued its opinion in *Ferrante* and while the case was still pending judicial review on the merits, ICCAT held its third special meeting in Funchal, Madeira Island, Portugal.[143] On the basis of a new SCRS study, the Commission approved an increase in the annual allowable catch of Atlantic bluefin tuna in the western Atlantic to 2,660 mt, an increase of 1,500 mt over the allocation approved at the 1982 Miami, Florida meeting.[144] As a result, the United States

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141. Ferrante v. Peterson, No. 82-2163, 5 (D.C. Cir. filed June 29, 1982). The court failed to respond to plaintiff's allegations that no valid recommendation with formal ICCAT approval resulted from the joint consultations of the three contracting parties, noting only that "[i]f the Secretary possesses authority to prohibit bluefin fishing altogether, a fortiori, he possesses authority to prohibit less than all unless it would be contrary to an ICCAT recommendation." *Id.* at 6. It would be unreasonable for the Secretary to act at all in the absence of a valid recommendation.

142. Ferrante v. Peterson, No. 82-2163 (D.C. Cir. filed June 29, 1982).

143. Report of the United States Delegation to the Third Special Meeting of ICCAT, Office of International Fisheries Affairs, National Marine Fisheries Service (November 24, 1982).

144. The SCRS committee met for thirteen days immediately preceding the ICCAT meeting. The Commission was particularly concerned with the last SCRS report (SCRS 81/55)

quota increased for the 1983 fishing season from 605 mt to 1,387.3 mt; Japan received a quota of 699.4 mt; and Canada's quota became 573.3 mt.[145] While the 1,387.3 mt United States quota was not as high as the pre-1981 quota of approximately 2,000 mt, it did go a long way toward easing the economic burdens on the domestic Atlantic bluefin tuna industry while remaining consistent with the conservation goals of ICCAT. Nonetheless, NOAA implementation of the 1981 moratorium had a significant impact on the domestic Atlantic bluefin tuna industry.

Curiously, the government in *Ferrante* added insult to injury by filing a supplemental memorandum incorporating the new ICCAT recommendation. The government wrote that if the Secretary of Commerce could not promulgate regulations implementing an ICCAT recommendation until after the six month period as provided in Article VIII of the Convention, which was suggested by plaintiff fishermen in *Ferrante*, it might not be possible to have any new regulations in place by the time the 1983 domestic Atlantic bluefin tuna fishing season began.[146] In so doing, the government appeared to be threatening the fishermen with a continuation of the moratorium. However, the ICCAT recommendation had been approved by the Commission in November, and the domestic Atlantic bluefin tuna fishing season was set to begin in June. This would have been sufficient time for the agency to promulgate new regulations.

VII. Domestic Impacts of International Management of Atlantic Bluefin Tuna

Examined within the context of the 1981 ICCAT recommendation and its implementation by NOAA, the government's continuing support of its juridical position on highly migratory species indicates that a fishery management decision having severe economic repercussions on the domestic fishing industry may be made in some other

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regarding Atlantic bluefin tuna:

> "in that its scientific findings constituted a range of possibilities without a clear conclusion. Fourteen papers on bluefin tuna were considered by SCRS, and two opinions emerged generally representing work submitted by U.S. scientists on the one hand and Japanese scientists on the other. The SCRS report concluded that the assessment on which its 1981 recommendations were based could no longer be used because of changes in the historical data base reported during 1981-82 and because the stock recruitment relation used is now considered to be 'erroneous'."

Id. at 2, 3.

145. Report of the United States Delegation, *supra* note 135, at 1.

146. Supplemental Memorandum for Defendants at 2, A.A. Ferrante Fishing Corp. v. Allen E. Peterson, Jr., No. 82-2163 (D.C. Cir. filed June 29, 1982).

part of the world without affording industry representatives an opportunity to participate in that decision. Furthermore, NOAA takes the position that such recommendations may be implemented through rulemaking procedures that fail to take into account legitimate alternatives, economic factors, the soundness of the biological data used, or the application of other domestic procedural statutes designed to create industry participation in the rulemaking process. That plaintiff fishermen may, for all practical purposes, be precluded from securing judicial review of such decisions due to foreign policy considerations underscores the need for a domestic rather than an international management framework. Specifically, decisions having a pervasive domestic impact should be made within a domestic framework. International management of Atlantic bluefin tuna and the present United States juridical position on highly migratory species no longer serve the public interest.[147]

Implementation of the 1981 ICCAT recommendation completely displaced the commercial purse seine fishermen and severely disrupted the commercial handgear fishermen[148] by imposing restrictive daily quotas and making the search for the fish more expensive than the value of the fish caught. The recommendation also had a negative impact on the ability of domestic tuna dealers to satisfy Japanese markets. The two-year moratorium was conservatively estimated by NOAA to cost the domestic Atlantic bluefin tuna industry fourteen million dollars.[149] Since, the moratorium was only in place for one year, a logical estimate suggests that it may have cost the industry approximately one half that amount.

NOAA's improper preemption of the coastal state authority and its failure to afford them a reasonable period of time to implement the ICCAT recommendations arguably violated the provisions of ATCA. Its actions certainly contravened the legal position it expressed in the prior agency implementation of the 1974 ICCAT recommendation. At a minimum, the NOAA's action constituted an arrogant exercise of ostensible federal power at the expense of the coastal states' traditional authority over their respective territorial waters

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147. For a discussion and conclusion that the juridical position of the United States on highly migratory species is weak see Rasmussen, *The Tuna War: Fishery Jurisdiction in International Law*, U. ILL. L.R. 744-755 (1981).

148. Commercial handgear fishermen use hand held lines, rods and reels, and harpoons to catch tuna.

149. *See supra* text and note at note 77.

and a violation of basic principles of cooperative federal-state management of Atlantic bluefin tuna.

The international management of Atlantic bluefin tuna to date has done inequitable harm to domestic fishermen. The international framework has exempted countries that harvest Atlantic bluefin tuna in the western Atlantic, such as Brazil and Cuba, from the conservation provisions of the 1981 recommendation. By effectively authorizing Brazil's fishery to expand, this exemption also appears to contradict directly the 1974 recommendation limiting fishing mortality to recent levels. Moreover, there are no mechanisms to assure that other countries, such as Japan, adhere to the ICCAT recommendation or sanction their fishermen for violating international quotas. Currently, some foreign fishermen may enter waters within the United States two-hundred-mile fishery conservation zone and harvest Atlantic bluefin tuna as they please.

In implementing the 1981 recommendation, NOAA, under the guise of foreign policy and international relations, has effectively foreclosed from participation in the rulemaking process parties that have traditionally taken part in the conservation and management of the resource, such as the domestic fishing industry and coastal states. Furthermore, by interpreting ATCA in such a way as to require a mechanical implementation of any ICCAT recommendation, NOAA has excluded any discretion in its rulemaking, thereby eliminating its accountability for both the recommendation itself and its implementation.

In the past courts have recognized, to varying degrees, the government's continuing and historical use of the political question doctrine as a defense to legal challenges to international recommendations. This recognition represents a tacit acknowledgement that international resource management decisions are in fact rooted in political considerations. The management of the western Atlantic stock of bluefin tuna within such a political framework, is beneficial neither to resource conservation goals nor to those whose livelihood depends upon the resource.

In the continuing conservation and management of highly migratory species there is always room for cooperative international agreements for scientific study and for the establishment of international organizations to consider conservation and management recommendations.[150] Ultimately, however, it is unworkable, particular-

150. *See, e.g.*, the recently enacted Nauru Agreement Concerning Cooperation in the

ly in the case of Atlantic bluefin tuna, to endow such organizations with management responsibilities or the attributes of national regulatory and management entities.

The 1981 ICCAT recommendation was the first international recommendation to manage separately two distinct stocks of Atlantic bluefin tuna. Despite the United States scientists' refusal to declare officially that Atlantic bluefin tuna is composed of two separate stocks, the species is now managed as such. However, the weight of scientific evidence suggests that it may be inaccurate to classify a single stock of Atlantic bluefin tuna as a "highly migratory" species. If the western stock of Atlantic bluefin tuna is to be managed differently than the eastern stock, and if the management measures have significant domestic impacts, it is essential that the decisionmaking body be held accountable for its management decisions. To meet this goal, these management measures should be created within a procedural framework that affords an opportunity for judicial review.

During the 1982 congressional session two bills were introduced in Congress seeking to include Atlantic bluefin tuna under the authority of the Magnuson Act which currently excludes highly migratory species from domestic management.[151] As suggested above,[152] the adoption of the 1981 ICCAT recommendation forced the domestic Atlantic bluefin tuna fishermen to refocus their efforts from lobbying for passage of these bills to challenging the 1981 ICCAT recommendation. Without active support for these bills, they languished in committee and were never enacted into law. Should such bills be refiled during the 1984 congressional session, Congress should take a close look at the current United States juridical position, the needs of the domestic fishermen, and the realities of international practice. An attempt to bring the United States in line with the majority of other countries by exercising authority over highly migratory species would be difficult due to the strong lobbying interests of the west coast fishermen; however, Congress should take the initiative

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Management of Fisheries of Common Interest, November 6, 1981. Signatory nations include Micronesia, Kiribati, the Marshall Islands, Nauru, Palau, Papua, New Guinea and the Solomon Islands. Article I of the Treaty provides: "The Parties shall seek, without any derogation of their respective sovereign rights, to coordinate and harmonize the management of fisheries with regard to common stocks within the Fisheries Zones, for the benefit of their peoples." These fishery stocks include highly migratory species of tuna.

151. S. 1564, H.R. 4457, 99th Cong., 2nd Sess. (1982).

152. *See supra* text and note at note 58.

in formulating a proper legislative position on highly migratory species, beginning with Atlantic bluefin tuna.

The arguments in favor of international management of Atlantic bluefin tuna are no longer valid. The 1981 ICCAT recommendation constituted nothing more than a trilateral agreement between Canada, Japan, and the United States. These three nations, all of which are actively involved in the bluefin tuna fishery in the western Atlantic, can effectively conserve the western Atlantic stock through other means. For example, conservation of the western Atlantic stock could be achieved through bilateral agreements between Canada, Mexico, Japan, and the United States. In fact, such agreements are already operable in other fisheries, such as those for halibut and salmon. All countries concerned with the conservation of Atlantic bluefin tuna could participate in the management process and recommend appropriate conservation measures through international forums. Furthermore, if the United States were to declare unilateral authority over Atlantic bluefin tuna under the Magnuson Act, it is unlikely that such a decision would be opposed by those countries that were specifically exempt from the 1981 ICCAT recommendation, such as Brazil and Cuba, or by the vast number of foreign nations presently exercising authority over highly migratory species; thus there would be no unfavorable reaction to a similar United States declaration of authority.

In short, there are no real advantages to the management of Atlantic bluefin tuna through an international framework. The establishment of a two year fishing moratorium is evidence that ICCAT, since its inception in 1969, has been vulnerable to political pressures. Except for the creation of basic and fundamental minimum size regulations, it has failed to adopt recommendations that would uniformly conserve and manage the resource on a consistent and stable basis. More effective management of the Atlantic bluefin tuna could be achieved by observing the following recommendations.

VII. Recommendations for Domestic Management

The Magnuson Act should be amended to bring the Atlantic bluefin tuna, if not all Atlantic tunas, within the management authority of the United States. The Magnuson Act creates a national fishery management program to foster conservation of fishery resources within two hundred miles of the United States coastline.[153] This na-

153. 16 U.S.C. §§ 1801-1882 (1976). *See supra* text and notes at notes 32-36.

tional program also establishes a comprehensive two-part procedure for the adoption of fishery management regulations which is designed to assure adequate public input into the decisionmaking process.[154]

Most importantly from a management perspective, fishery management decisions under the Magnuson Act are based on the concept of optimum yield, a process that reflects the economic and social needs of the fishing industry as well as the conservation of the resource.[155] In contrast, ICCAT management decisions are based on the concept of maximum sustainable yield, a strictly biological term.[156] Consideration of the livelihood of the fishermen and the economic well-being of the fishing industry is vitally important to any fishery management decision. The Magnuson Act recognizes that in the conservation and management of the resource there are implications for and impacts on the fishermen that must be accounted for. This framework is far more responsive and receptive to the realities of the domestic fishing industry than is the present international framework, and still provides the mechanisms to ensure sufficient protection of the resource itself.

From the perspective of the fishermen, the industry, and the coastal states, domestic management under the Magnuson Act offers opportunities for input into the development of the fishery management plan at the regional level and the implementation of the plan at the federal agency level. For example, the Act would establish direct industry participation in the regional council decisionmaking process. The regional councils, which have been in existence since approximately 1977, are composed of representatives from the regulated industries and are currently developing management

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154. The regional fishery management councils must hold public hearings during the development of a fishery management plan. 16 U.S.C. § 1852 (1976). The Secretary of Commerce must publish the plan in the *Federal Register* for comment prior to plan approval. 16 U.S.C. § 1854 (1976). For a general discussion of the fishery management plan process see Rogalski, W., *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*2, 9 B.C. ENVT'L AFF. L. REV. 163 (1980).

155. The Magnuson Act defines optimum yield as "the amount of fish - (A) which will provide the greatest overall benefit to the Nation with particular reference to food production and recreational opportunities; and (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social or ecological factor." 16 U.S.C. § 1802 (1976).

156. The Convention authorizes the Commission to "make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the convention area at levels which will permit the maximum sustainable catch." International Convention for the Conservation of Atlantic Tunas, March 21, 1969, 20 U.S.T. 2887, T.I.A.S. No. 6767, Article III.

plans for the fishery resources found within their respective geographic areas of authority. In the long run, industry participation will encourage greater voluntary compliance with the regulations and discourage litigation, thereby permitting more effective enforceability of the management plan.

The management framework offered by the Magnuson Act was designed to regulate domestic fishing activity in a manner both consistent with conservation goals and responsive to industry needs. It is beginning to prove itself to be an effective means of regulating other commercial fisheries. There is no reason why the Magnuson Act should not regulate Atlantic bluefin tuna located within the United States two hundred mile fishery conservation zone.

IX. Conclusion

The problems that plague the management of the Atlantic bluefin tuna fishery are representative of the deficiencies inherent in the present framework of international management of highly migratory species. The current management system places the economic burdens of conserving the Atlantic bluefin tuna squarely on the shoulders of the domestic industry but provides no guarantees that the domestic fishermen who currently bear these burdens will be rewarded in the future. In addition, there are no mechanisms for preventing Mexico, Cuba, Brazil, or even Canada or Japan from overfishing the stocks in the unlikely event of stock rebuilding. It is unconscionable to require United States fishermen to conserve Atlantic bluefin tuna when their efforts only enure to the benefit of foreign nations and their fishermen. Considering the interests of the domestic industry, the coastal states, and conservation policy in general, it is no longer appropriate for the United States to continue to observe the policies set forth in the ICCAT recommendations or as embodied in the Convention.